

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA, ) CR-18-00258-EJD  
)  
PLAINTIFF, )  
) SAN JOSE, CALIFORNIA  
VS. )  
) NOVEMBER 4, 2019  
ELIZABETH A. HOLMES AND RAMESH )  
SUNNY BALWANI, ) PAGES 1 - 92  
)  
DEFENDANTS. )  
\_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE EDWARD J. DAVILA  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE  
BY: JOHN C. BOSTIC  
JEFFREY B. SCHENK  
150 ALMADEN BOULEVARD, SUITE 900  
SAN JOSE, CALIFORNIA 95113  
  
BY: ROBERT S. LEACH  
1301 CLAY STREET, SUITE 340S  
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP  
BY: KEVIN M. DOWNEY  
LANCE A. WADE  
KATHERINE A. TREFZ  
MICHELLE CHEN  
725 TWELFTH STREET, N.W.  
WASHINGTON, D.C. 20005

FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP  
BY: JEFFREY COOPERSMITH  
WALTER F. BROWN, JR.  
RANDALL LUSKEY  
AMANDA MCDOWELL  
STEPHEN CAZARES  
THE ORRICK BUILDING  
405 HOWARD STREET  
SAN FRANCISCO, CALIFORNIA 94105

ALSO PRESENT: U.S. ATTORNEY'S OFFICE  
CIVIL DIVISION  
BY: ALLISON DAW  
150 ALMADEN BOULEVARD, SUITE 900  
SAN JOSE, CALIFORNIA 95113

TELEPHONICALLY FOOD AND DRUG ADMINISTRATION  
BY: MARCI NORTON  
JACKLYN MARTINEZ-RESLY

DEPARTMENT OF HEALTH HUMAN  
SERVICES  
BY: LINDSAY TURNER

1 SAN JOSE, CALIFORNIA

NOVEMBER 4, 2019

2 P R O C E E D I N G S

10:14AM 3 (COURT CONVENED AT 10:14 A.M.)

10:14AM 4 THE COURT: THANK YOU FOR YOUR COURTESY.

10:14AM 5 LET'S CALL OUR MORNING CALENDAR. THIS IS 18-258, UNITED  
10:15AM 6 STATES VERSUS HOLMES AND BALWANI.

10:15AM 7 WHY DON'T I CAPTURE APPEARANCES, PLEASE.

10:15AM 8 MR. BOSTIC: GOOD MORNING, YOUR HONOR. JOHN BOSTIC,  
10:15AM 9 JEFF SCHENK, AND BOB LEACH FOR THE UNITED STATES.

10:15AM 10 MR. LEACH: GOOD MORNING, YOUR HONOR.

10:15AM 11 THE COURT: GOOD MORNING.

10:15AM 12 MS. DAW: ALLISON DAW, ASSISTANT UNITED STATES  
10:15AM 13 ATTORNEY FOR THE CIVIL DIVISION FOR THE FDA AND CMS.

10:15AM 14 THE COURT: THANK YOU. THANK YOU FOR BEING HERE.

10:15AM 15 MS. DAW: MY PLEASURE.

10:15AM 16 MR. WADE: GOOD MORNING. LANCE WADE. WITH ME ARE  
10:15AM 17 MY COLLEAGUES, KEVIN DOWNEY, KATHERINE TREFZ, AND MICHELLE CHEN  
10:15AM 18 ON BEHALF OF MS. HOLMES WHO IS PRESENT.

10:15AM 19 THE COURT: THANK YOU. GOOD MORNING.

10:15AM 20 MR. COOPERSMITH: GOOD MORNING, YOUR HONOR.

10:15AM 21 JEFF COOPERSMITH FOR MR. BALWANI. MY COLLEAGUES, RANDY  
10:15AM 22 LUSKEY, AMANDA MCDOWELL, WALT BROWN, AND STEVE CAZARES ARE  
10:15AM 23 PRESENT AS WELL AS IS MR. BALWANI.

10:15AM 24 THE COURT: THANK YOU. GOOD MORNING.

10:15AM 25 I THINK WE HAVE SOME INDIVIDUALS TELEPHONICALLY APPEARING,

10:15AM 1 MS. KRATZMANN?

10:15AM 2 THE CLERK: YES, YOUR HONOR.

10:15AM 3 THE COURT: MAY I CAPTURE THOSE APPEARANCES, PLEASE.

10:15AM 4 LET'S START -- IS MS. TURNER ON THE LINE?

10:16AM 5 MS. TURNER: YES, YOUR HONOR. YES, I AM, YOUR  
10:16AM 6 HONOR. LINDSAY TURNER FROM HHS ON BEHALF OF CMS.

10:16AM 7 THE COURT: THANK YOU.

10:16AM 8 WHO IS ON THE LINE REGARDING THE FDA?

10:16AM 9 MS. MARTINEZ-RESLY: GOOD MORNING, YOUR HONOR. THIS  
10:16AM 10 IS JACKLYN MARTINEZ-RESLY AND MARCI NORTON FOR THE FDA.

10:16AM 11 THE COURT: GOOD MORNING TO EACH OF YOU, AND THANK  
10:16AM 12 YOU FOR JOINING US TELEPHONICALLY. I THINK YOUR PRESENCE WILL  
10:16AM 13 BE HELPFUL AS WE DISCUSS SOME OF THE ISSUES THAT REMAIN IN THIS  
10:16AM 14 CASE.

10:16AM 15 LET ME START OFF BY SAYING I HAVE HAD BENEFIT OF  
10:16AM 16 DOCUMENT 170, WHICH IS YOUR JOINT STATEMENT, AND YOU'VE TOLD ME  
10:16AM 17 A LITTLE BIT ABOUT THE PROGRESS THAT WE'VE HAD.

10:16AM 18 LET ME -- I HAVE SOME THOUGHTS, AND, CANDIDLY, I WAS  
10:16AM 19 THINKING THAT MAYBE I SHOULD JUST COME OUT AND TELL YOU WHAT  
10:16AM 20 I'M THINKING NOW TO DO RATHER THAN -- AND I'M NOT SUGGESTING I  
10:16AM 21 DON'T WANT TO HEAR FROM YOU BECAUSE I ALWAYS LEARN FROM YOU  
10:17AM 22 WHEN WE HAVE THESE HEARINGS.

10:17AM 23 I AM, FIRST OF ALL, ENCOURAGED THAT THE PROTOCOL THAT THIS  
10:17AM 24 COURT HAS TAKEN HAS PRODUCED SOME OF THE EVIDENCE AND DOCUMENTS  
10:17AM 25 THAT THE DEFENSE HAS REQUIRED.

10:17AM 1 WE HAVE HAD, HAVEN'T WE, THIS LONG CONVERSATION FROM THE  
10:17AM 2 DEFENSE PERSPECTIVE AS TO WHETHER OR NOT THE GOVERNMENT HAS  
10:17AM 3 KNOWLEDGE, ACCESS, CONTROL, ET CETERA, OF SOME OF THIS  
10:17AM 4 INFORMATION.

10:17AM 5 I ENGAGED A PROTOCOL, AND THIS IS FOR THE BENEFIT OF OUR  
10:17AM 6 COLLEAGUES WHO ARE ON THE PHONE HERE. I ENCOURAGED A PROTOCOL  
10:17AM 7 THAT I THOUGHT WOULD PERMIT MORE DIRECT, IF YOU WILL, ACCESS TO  
10:17AM 8 THE INFORMATION BECAUSE WE HAD THE AGENCY'S ATTENTION AND THEY  
10:17AM 9 WERE RESPONDING.

10:17AM 10 THAT MORPHED, A LITTLE BIT, IF I COULD USE THAT CRUDE  
10:17AM 11 WORD, INTO ASSISTING, THE GOVERNMENT ASSISTING THOSE AGENCIES  
10:17AM 12 IN PRODUCING THE INFORMATION.

10:17AM 13 WE KNOW THAT, FOR EXAMPLE, I THINK THE GOVERNMENT'S --  
10:18AM 14 EXCUSE ME -- DEFENSE MOTION WAS FILED IN APRIL OF THIS YEAR I  
10:18AM 15 THINK IT WAS AND VERY CLOSE TO THE START OF THE BASEBALL  
10:18AM 16 SEASON, AND NOW WE'RE POST WORLD SERIES.

10:18AM 17 (LAUGHTER.)

10:18AM 18 MR. WADE: DULY NOTED, YOUR HONOR, THE WORLD SERIES.

10:18AM 19 THE COURT: YES, I APPRECIATE THAT. I WAS IN D C.  
10:18AM 20 I COULDN'T GET TO THE PARADE BECAUSE OF FLIGHT OBLIGATIONS, BUT  
10:18AM 21 I WAS ABLE TO DRIVE AROUND WITH MY DAUGHTER, AND WE OBSERVED A  
10:18AM 22 LOT OF RED AND A LOT OF PEOPLE MOVING TOWARDS THE POTOMAC IN A  
10:18AM 23 CERTAIN AREA. SO WE VICARIOUSLY ENJOYED THE CELEBRATION.

10:18AM 24 CONGRATULATIONS TO THOSE OF YOU FROM THE NATION'S  
10:18AM 25 CAPITAL.

10:18AM 1 MR. WADE: THANK YOU.

10:18AM 2 (LAUGHTER.)

10:18AM 3 THE COURT: YOU'RE WELCOME. IT'S BEEN A FEW DECADES  
10:18AM 4 SINCE YOU'VE BEEN ABLE TO ENJOY THAT CELEBRATION, AND  
10:18AM 5 WALTER JOHNSON IS RISING I'M SURE. SO CONGRATULATIONS FOR  
10:18AM 6 THAT. THAT'S WHY YOU'RE HERE SO HAPPY. I'M GLAD YOU WERE ABLE  
10:19AM 7 TO GET TO THE PARADE. I'M HOPE YOU DID.

10:19AM 8 MR. WADE: I DID, YOUR HONOR.

10:19AM 9 THE COURT: GOOD. GOOD. WELL DONE.

10:19AM 10 BUT WE WENT THROUGH THAT COLLABORATIVE, IF YOU WILL,  
10:19AM 11 APPROACH.

10:19AM 12 I THINK FROM MY PERSPECTIVE IT DID ALLOW FOR THE  
10:19AM 13 PRODUCTION OF DOCUMENTS. WE KNOW IN SOME OF THE EARLIER  
10:19AM 14 STATEMENTS FROM THE AGENCIES THAT THE TERM "6 MONTHS," WAS  
10:19AM 15 INDICATED IT WOULD TAKE THAT LONG TO PRODUCE THE DOCUMENTS.

10:19AM 16 THE GOVERNMENT HERE IN THIS COURTHOUSE DISAGREED WITH  
10:19AM 17 THAT. THEY SAID THAT'S TOO LONG. I THINK WE ALL WERE IN  
10:19AM 18 AGREEMENT THAT THAT WAS TOO LONG, AND NONETHELESS, WE'RE HERE  
10:19AM 19 GETTING CLOSE TO THAT TIME PERIOD.

10:19AM 20 I THINK WHAT WE CAN DO, THOUGH, WITH YOUR HELP, WITH YOUR  
10:19AM 21 STATEMENTS AND WHERE THINGS ARE, I KNOW THAT DOCUMENTS, MANY OF  
10:19AM 22 THEM, HAVE BEEN PRODUCED. THE DEFENSE SUGGESTS THAT THEY NEED  
10:19AM 23 MORE AND PERHAPS DIFFERENT PARAMETERS TO COMPLETE THIS PROCESS.

10:20AM 24 LET ME JUST SAY THAT I WANT THIS PROCESS TO BE COMPLETE  
10:20AM 25 BEFORE THE END OF THIS YEAR, AND I INTEND TO ISSUE AN ORDER

10:20AM 1 THAT ORDERS THAT.

10:20AM 2 MY THOUGHT ABOUT -- LET ME JUST DIGRESS FOR A MOMENT TO  
10:20AM 3 THINK ABOUT THE GOVERNMENT'S POSITION AS TO WHETHER OR NOT THEY  
10:20AM 4 HAVE ACCESS, ET CETERA.

10:20AM 5 I STEP BACK AND I LOOK AT THE FDA AND CMS AND THEIR  
10:20AM 6 INVOLVEMENT HERE, AND LET ME JUST ASK THIS QUESTION OF  
10:20AM 7 MS. TURNER, OF MS. NORTON, AND OF MS. MARTINEZ-RESLY. AND  
10:20AM 8 THANK YOU, COUNSEL, THANK YOU FOR BEING ON THE LINE. IT'S VERY  
10:20AM 9 HELPFUL TO HAVE ACCESS TO THE LAWYERS WHO REPRESENT THESE  
10:20AM 10 AGENCIES.

10:20AM 11 AS I UNDERSTAND IT THE GOVERNMENT, THAT IS THE  
10:20AM 12 PROSECUTION, HAVE BEEN ASSISTING YOU IN CONDUIT, IF YOU WILL,  
10:20AM 13 TO PROVIDE INFORMATION FOR THE PRODUCTION OF THE DISCOVERY.  
10:21AM 14 THEY'VE ALLOWED YOU TO USE THE -- WHAT IS THE ACRONYM FOR THE  
10:21AM 15 DATABASE?

10:21AM 16 MS. DAW: LTSC, YOUR HONOR.

10:21AM 17 THE COURT: YES, YES, TO DOWNLOAD THE INFORMATION TO  
10:21AM 18 ASSIST.

10:21AM 19 AND MY SENSE IS THAT THAT HAS BEEN OF GREAT ASSISTANCE TO  
10:21AM 20 YOU, MS. TURNER?

10:21AM 21 MS. TURNER: YES, THAT'S RIGHT, YOUR HONOR. IT'S  
10:21AM 22 BEEN OF GREAT ASSISTANCE TO BE ABLE TO USE THAT LTSC DATABASE,  
10:21AM 23 AND OTHERWISE I'M NOT SURE HOW THE AGENCY WOULD HAVE BEEN ABLE  
10:21AM 24 TO PRODUCE THESE DOCUMENTS AND REVIEW THEM.

10:21AM 25 THE COURT: THANK YOU.

10:21AM 1 AND, MS. NORTON AND MS. MARTINEZ-RESLY, MY SENSE IS THAT  
10:21AM 2 YOU WOULD CONCUR IN THAT OBSERVATION?

10:21AM 3 MS. MARTINEZ-RESLY: YOUR HONOR, WE HAVE BEEN --  
10:21AM 4 THE COURT: THIS IS MS. MARTINEZ?

10:21AM 5 MS. MARTINEZ-RESLY: YES, I APOLOGIZE. THIS IS  
10:21AM 6 MS. MARTINEZ-RESLY.

10:21AM 7 WE HAVE BEEN KEEPING THE PROSECUTION ABREAST OF THE STATUS  
10:21AM 8 OF OUR REVIEW AND PRODUCTION OF DOCUMENTS.

10:22AM 9 HOWEVER, WE HAVE BEEN USING THE DEPARTMENT OF HEALTH AND  
10:22AM 10 HUMAN SERVICES'S DOCUMENT REVIEW PLATFORM BECAUSE WE HAVE  
10:22AM 11 SPECIFIC LIMITATIONS ON THE KIND OF INFORMATION THAT WE'RE ABLE  
10:22AM 12 TO PROVIDE OUTSIDE OF THE DEPARTMENT BY REGULATION AND BY  
10:22AM 13 STATUTE INCLUDING TO THE DEPARTMENT OF JUSTICE.

10:22AM 14 SO THAT'S WHY WE'VE BEEN USING THE DEPARTMENT OF HEALTH  
10:22AM 15 AND HUMAN SERVICES'S DOCUMENT REVIEW PLATFORM.

10:22AM 16 THE COURT: I SEE. WELL, THANK YOU FOR THAT.

10:22AM 17 LET ME ASK, HAS THE GOVERNMENT THEN -- AND I'M NOT ASKING  
10:22AM 18 YOU TO GRADE THEM BUT JUST IN GENERAL -- HAS THE GOVERNMENT,  
10:22AM 19 THE PROSECUTION, BEEN HELPFUL IN THEIR COMMUNICATION WITH YOU  
10:22AM 20 AND YOUR COMMUNICATION WITH THEM IN DISCUSSING THE VARIOUS  
10:22AM 21 TYPES OF PRODUCTION AND, PARDON ME, THE EVIDENCE, THE  
10:22AM 22 DOCUMENTS, AND THEIR PRODUCTION? HAS THAT BEEN HELPFUL?

10:22AM 23 MS. MARTINEZ-RESLY: YES. THIS IS  
10:23AM 24 MS. MARTINEZ-RESLY AGAIN.

10:23AM 25 YES, THE GOVERNMENT HAS BEEN RESPONSIVE AND CLEAR IN



10:23AM 1 COMMUNICATING WHAT THE REQUESTS ENTAIL. SO, YES, I WOULD AGREE  
10:23AM 2 WITH THAT STATEMENT.

10:23AM 3 THE COURT: ALL RIGHT. AND MY SENSE IS THAT  
10:23AM 4 CONTINUED COOPERATION AND COLLABORATION WITH THEM WOULD ASSIST  
10:23AM 5 YOU GOING FORWARD?

10:23AM 6 MS. MARTINEZ-RESLY: YES, THAT IS CORRECT.

10:23AM 7 THE COURT: OKAY. THERE'S BEEN NO OBJECTION TO A  
10:23AM 8 LEADING QUESTION YET BUT -- SO LET ME JUST ASK, MS. TURNER,  
10:23AM 9 MS. NORTON, AND MS. MARTINEZ-RESLY, ARE YOU PREPARED NOW TO  
10:23AM 10 CONTINUE TO PROVIDE THIS ASSISTANCE AND WORK COLLABORATIVELY  
10:23AM 11 WITH THE PROSECUTION HERE IN THIS ENDEAVOR?

10:23AM 12 MS. MARTINEZ-RESLY: THIS IS MS. MARTINEZ-RESLY.

10:23AM 13 YES, THE FDA IS PREPARED TO CONTINUE TO DO THAT.

10:23AM 14 THE COURT: ALL RIGHT.

10:23AM 15 MS. TURNER: YES, THIS IS MS. TURNER.

10:23AM 16 AND CMS IS PREPARED TO DO THAT AS WELL.

10:23AM 17 THE COURT: WELL, THANK YOU VERY MUCH.

10:24AM 18 DOES THAT INCLUDE THEN PROVIDING THE PROSECUTION HERE  
10:24AM 19 ACCESS TO INFORMATION THAT YOU INTEND TO PROVIDE AND THAT YOU  
10:24AM 20 PERHAPS -- INCLUDING INFORMATION THAT YOU WOULD DETERMINE NOT  
10:24AM 21 TO PROVIDE? WOULD YOU INCLUDE THE GOVERNMENT IN THOSE  
10:24AM 22 DISCUSSIONS?

10:24AM 23 MS. NORTON: THIS IS MS. NORTON, YOUR HONOR.

10:24AM 24 NO, WE WOULD NOT BE PROVIDING THE PROSECUTION WITH ANY  
10:24AM 25 DOCUMENTS THAT WE ARE NOT ALSO PROVIDING TO THE DEFENDANTS.

10:24AM 1 THE COURT: OKAY.

10:24AM 2 MS. TURNER: THIS IS MS. TURNER.

10:24AM 3 THE SAME FOR CMS AS WELL.

10:24AM 4 THE COURT: AND THAT IS BECAUSE, IF YOU COULD JUST  
10:24AM 5 TELL ME?

10:24AM 6 MS. NORTON: WELL, THIS IS MS. NORTON.

10:24AM 7 THE FDA HAS A GROUP OF PEOPLE WHO REVIEW DOCUMENTS FOR  
10:24AM 8 RESPONSIVENESS AND FOR PRODUCTION AND FOR PRIVILEGE.

10:24AM 9 WE HAVE SEVERAL, AS MS. MARTINEZ-RESLY MENTIONED,  
10:25AM 10 STATUTORY PROHIBITIONS ON THE PRODUCTION OF CONFIDENTIAL  
10:25AM 11 COMMERCIAL INFORMATION AND TRADE SECRET INFORMATION OF THIRD  
10:25AM 12 PARTIES OTHER THAN THERANOS BECAUSE HERE WE HAVE A WAIVER FROM  
10:25AM 13 THE THERANOS ASSIGNEE PERMITTING US TO PRODUCE THERANOS'S  
10:25AM 14 CONFIDENTIAL INFORMATION IN THE CONTEXT OF THIS LITIGATION.

10:25AM 15 BUT WE HAVE TO REVIEW THE DOCUMENTS BEFORE THEY CAN BE  
10:25AM 16 PRODUCED TO ANYBODY TO MAKE SURE, YOU KNOW, FIRST, THAT THEY  
10:25AM 17 ARE RESPONSIVE, BUT IF THEY'RE NOT RESPONSIVE WE WOULDN'T BE  
10:25AM 18 TURNING THEM OVER TO ANY PARTY; AND, SECOND, TO MAKE SURE THAT  
10:25AM 19 THERE IS NOT INFORMATION IN THE DOCUMENTS THAT WERE PROHIBITED  
10:25AM 20 BY LAW FROM PRODUCING, OR THAT THEY ARE SUBJECT TO A PRIVILEGE  
10:25AM 21 THAT THE AGENCY HAS NOT WAIVED. THOSE WOULD ALSO HAVE TO BE  
10:25AM 22 REDACTED BEFORE THEY WERE PRODUCED.

10:25AM 23 SO WHAT THE FDA IS DOING IS THAT IT'S REVIEWING THE  
10:25AM 24 DOCUMENTS INHOUSE, AND THEN IF THE DOCUMENT IS RESPONSIVE AND  
10:25AM 25 NOT PRIVILEGED, IT'S BEING PRODUCED TO THE PARTIES.

10:26AM 1 THE COURT: ALL RIGHT. THANK YOU.

10:26AM 2 MS. TURNER: THIS IS MS. TURNER FOR CMS.

10:26AM 3 WE ARE REVIEWING THE DOCUMENTS IN HOUSE FOR ATTORNEY  
10:26AM 4 CLIENT AND WORK PRODUCT PRIVILEGES, AND ALSO WE WILL BE  
10:26AM 5 SPOT-CHECKING THE DOCUMENTS FOR SOME INFORMATION THAT IS  
10:26AM 6 DELIVERED AND THAT DOESN'T HAVE ANYTHING TO DO WITH THERANOS.

10:26AM 7 THE COURT: OKAY. AND LET ME JUST SUGGEST SOMETHING  
10:26AM 8 TO YOU. I'M CERTAIN IN YOUR CAREERS THAT YOU HAVE HAD  
10:26AM 9 SITUATIONS WHERE YOUR AGENCIES HAVE BEEN INVOLVED IN CRIMINAL  
10:26AM 10 CASES, AND SO YOU HAVE SOME AFFINITY AND SOME KNOWLEDGE OF  
10:26AM 11 POTENTIAL, I'LL USE THE WORD, TENSION THAT SOMETIMES CAN ARISE  
10:26AM 12 BETWEEN A CIVIL CASE, A CRIMINAL CASE, AND THE RESPONSIBILITIES  
10:26AM 13 THAT -- AND OBLIGATIONS THAT PARTIES HAVE IN THOSE CASES.

10:26AM 14 I KNOW YOU HAVE FAMILIARITY WITH THOSE, MS. TURNER,  
10:27AM 15 MS. NORTON, AND MS. MARTINEZ-RESLY?

10:27AM 16 MS. MARTINEZ-RESLY: YES, YOUR HONOR.

10:27AM 17 MS. TURNER: YES, YOUR HONOR.

10:27AM 18 THE COURT: ALL RIGHT. THANK YOU.

10:27AM 19 AND MY SENSE ALSO IS THAT IN THOSE CRIMINAL CASES WHERE  
10:27AM 20 THERE IS SOME TENSION BETWEEN CIVIL AND CRIMINAL OBLIGATIONS  
10:27AM 21 THAT THE PROSECUTION COULD AND WOULD ASSIST YOUR VIEW AND YOUR  
10:27AM 22 AGENCY'S AND ATTORNEYS, AT LEAST PERHAPS EVEN INITIALLY AND  
10:27AM 23 CONTINUING TO IDENTIFY CERTAIN ISSUES THAT ARE UNIQUE TO  
10:27AM 24 CRIMINAL DISCOVERY AND CRIMINAL PRODUCTION THAT MIGHT ASSIST IN  
10:27AM 25 THE RELEASE OF CERTAIN INFORMATION OR PROVIDE YOU GREATER

1 AFFINITY FOR YOUR OBJECTIONS SUCH THAT THOSE COULD BE STATED AT  
2 A LATER DATE AT A LATER TIME.

3 DO YOU CAPTURE MY MEANING?

4 MS. TURNER: YES, YOUR HONOR.

5 THE COURT: MS. TURNER, MS. NORTON,  
6 MS. MARTINEZ-RESLY?

7 MS. NORTON: THIS IS MS. NORTON.

8 WE HEAR WHAT YOU'RE SAYING, YOUR HONOR.

9 THE COURT: SO WHAT I WAS SAYING -- AGAIN, I STARTED  
10 OFF BY ME TELLING THESE GOOD LAWYERS AND PEOPLE HERE WHAT MY  
11 INITIAL THOUGHTS ARE, AND LET ME COMPLETE THAT.

12 MY THOUGHTS ARE HERE, AS I LOOK AT THIS PRODUCTION OF  
13 DOCUMENTS THAT HAVE GONE FORWARD THAT HAVE BEEN RELEASED,  
14 THERE'S STILL SOME HICCUPS TO BE RESOLVED.

15 BUT I DO THINK -- I'M LOOKING TO THE GOVERNMENT'S TABLE  
16 HERE -- I DO THINK THAT WHAT THE COURT INTENDS TO DO IS TO  
17 ORDER THE CONTINUED PRODUCTION. WE'RE GOING TO DISCUSS THE  
18 NUANCES OF THAT IN JUST A MOMENT, BUT IN SOME MANNER THE COURT  
19 IS GOING TO ORDER THAT THESE DOCUMENTS, THIS DISCOVERY, BE  
20 PROVIDED, AND THE COURT IS GOING TO INVOKE RULE 16 AS TO THE  
21 GOVERNMENT AND INDICATE TO THE GOVERNMENT THAT THEIR  
22 OBLIGATIONS, THAT IS THE GOVERNMENT'S, THE PROSECUTION'S, THE  
23 COURT FINDS THAT THERE IS SUFFICIENT GROUNDS TO ESTABLISH THAT  
24 THERE IS A RULE 16 OBLIGATION FOR THE GOVERNMENT TO COMPLETE  
25 THE DISCOVERY THAT HAS BEEN TRACKED SO FAR.

10:29AM 1 NOW, WHAT THAT MEANS -- I'M LOOKING NOW TO THE DEFENSE  
10:29AM 2 TABLES -- THIS IS NOT AN INVITATION TO RELITIGATE WHAT HAS  
10:29AM 3 ALREADY BEEN PROVIDED AS A RULE 16 ISSUE. I THINK I'VE MADE  
10:29AM 4 THAT DECISION ALREADY, BUT WHAT I'M SUGGESTING IS THAT THE  
10:29AM 5 GOVERNMENT'S RULE 16 OBLIGATION ATTACHES TO THE FINISHING OF  
10:29AM 6 THIS DISCOVERY REQUEST SUCH THAT I DO THINK THAT THE  
10:29AM 7 GOVERNMENT -- IT'S APPROPRIATE TO FIND THAT THE RULE 16  
10:29AM 8 OBLIGATION WILL GO FORWARD FROM HERE TO COMPLETE THIS  
10:29AM 9 PRODUCTION OF INFORMATION.

10:30AM 10 SO I THINK IN GENERAL THAT'S THE OVERTONE OF WHAT I INTEND  
10:30AM 11 TO DO TODAY. ONE OF YOU MIGHT CONVINCE ME OTHERWISE.

10:30AM 12 MR. WADE, YOUR HEAD WAS MOVING UP AND DOWN WHICH I THINK  
10:30AM 13 IS A UNIFORM INDICATION OF CONFIRMATION.

10:30AM 14 MR. WADE: IT WAS, YOUR HONOR. YES.

10:30AM 15 THE COURT: OKAY. ALL RIGHT.

10:30AM 16 SO HAVING SAID THAT, SHOULD WE THEN HAVE A DISCUSSION  
10:30AM 17 ABOUT THESE OTHER REMAINING ISSUES AND THE NUANCES OF THEM, HOW  
10:30AM 18 THAT SHOULD BE PRODUCED WITH THESE AGENCIES?

10:30AM 19 I KNOW THE GOVERNMENT HAD SOME -- EXCUSE ME, THE DEFENSE  
10:30AM 20 HAD SOME QUESTIONS ABOUT SOME INFORMATION.

10:30AM 21 MR. COOPERSMITH: YES, YOUR HONOR, IT MAKES SENSE TO  
10:30AM 22 ME.

10:30AM 23 THE COURT: OKAY.

10:30AM 24 MR. WADE: YOUR HONOR, I THINK THAT IS SENSIBLE. I  
10:30AM 25 THINK ONE OF THE MOST SIGNIFICANT ISSUES IN THAT REGARD ARE

10:30AM 1 PRESERVATION ISSUES AND THE POSSIBILITY THAT IT WOULD APPEAR  
10:30AM 2 THAT DOCUMENTS MAY HAVE BEEN DESTROYED IN THIS CASE ARE NOT  
10:31AM 3 ADEQUATELY PRESERVED, SO I HOPE -- THAT'S AN ISSUE THAT WE HOPE  
10:31AM 4 WE CAN ADDRESS DIRECTLY HERE THIS MORNING BECAUSE IT'S  
10:31AM 5 OBVIOUSLY OF GREAT CONCERN TO US.

10:31AM 6 I'M SURE IT'S OF GREAT CONCERN TO THE GOVERNMENT AS WELL  
10:31AM 7 GIVEN THAT THE GOVERNMENT ASKED THE AGENCIES TO PRESERVE THESE  
10:31AM 8 DOCUMENTS YEARS AGO.

10:31AM 9 THE COURT: OKAY.

10:31AM 10 MS. DAW: IF I MAY BE HEARD ON THAT, YOUR HONOR?

10:31AM 11 THE COURT: YES.

10:31AM 12 MS. DAW: ALLISON DAW FOR THE HHS SUBAGENCIES FDA  
10:31AM 13 AND CMS.

10:31AM 14 I DON'T UNDERSTAND THE SOURCE OF THE CONCERN THAT  
10:31AM 15 DOCUMENTS HAVE NOT BEEN PRESERVED. I PARTICIPATED IN THE MEET  
10:31AM 16 AND CONFER TELEPHONE CALLS, AS DID ALL THREE ATTORNEYS WHO ARE  
10:31AM 17 ON THE PHONE.

10:31AM 18 THE CLERK: COULD YOU POINT THAT TO YOU. THERE YOU  
10:31AM 19 GO.

10:31AM 20 MS. DAW: AND I DON'T RECALL ANYBODY MAKING ANY  
10:31AM 21 REPRESENTATIONS THAT DOCUMENTS HAD NOT BEEN RETAINED. SO I,  
10:32AM 22 FRANKLY, AM AT A LOSS TO UNDERSTAND THE SOURCE OF THIS CONCERN  
10:32AM 23 ON DEFENSE'S PART.

10:32AM 24 THE COURT: OKAY. WELL, LET'S -- I THINK WE SHOULD  
10:32AM 25 PROBABLY AGENDIZE EACH OF THESE TOPICS AND THEN HAVE A

10:32AM 1 DISCUSSION OF THEM.

10:32AM 2 BUT FIRST, MS. KRATZMANN --

10:32AM 3 (DISCUSSION AMONGST COUNSEL OFF THE RECORD.)

10:32AM 4 THE COURT: SO LET'S -- WELL, WHY DON'T WE MARSHAL  
10:32AM 5 THROUGH SOME OF THE ISSUES HERE. WHY DON'T I CALL COUNSEL TO  
10:32AM 6 THE LECTERNS, DEFENSE COUNSEL AND GOVERNMENT COUNSEL, AND THEN  
10:32AM 7 WE'LL GET BACK TO THESE OTHER ISSUES.

10:33AM 8 (PAUSE IN PROCEEDINGS.)

10:33AM 9 THE COURT: SO I THINK WHAT I'LL DO, MR. BOSTIC, IS  
10:33AM 10 START WITH THE DEFENSE AND HAVE YOU TELL ME BASED ON MY  
10:33AM 11 OVERVIEW OF WHAT I INTEND TO DO HERE AND TO COMPLETE THIS TASK.

10:33AM 12 IN THE SPIRIT OF FULL DISCLOSURE ALSO I WANT TO TELL YOU  
10:33AM 13 THAT I INTEND TO MAKE, AS I SAID -- OH, GREAT. THANK YOU -- I  
10:33AM 14 INTEND TO MAKE SOME ORDERS THAT THIS GET DONE BY THE END OF THE  
10:33AM 15 YEAR.

10:33AM 16 MR. WADE: THANK YOU, YOUR HONOR. AND WE APPRECIATE  
10:33AM 17 THE COURT'S ASSISTANCE IN GETTING THIS INFORMATION WHICH, AS  
10:33AM 18 WE'VE DISCUSSED IN PREVIOUS HEARINGS, WE BELIEVE IS CRITICAL TO  
10:33AM 19 THE DEFENSE IN THIS CASE.

10:33AM 20 I, TOO -- WE OBVIOUSLY HAVE DIFFERENCES OF OPINION THAT  
10:33AM 21 WE'RE GOING TO RESOLVE WITH RESPECT TO THE AGENCIES IN THIS  
10:33AM 22 CASE, BUT RECOGNIZING THAT AGENCY COUNSEL IS PRESENT, WE  
10:34AM 23 UNDERSTAND THEY'RE WORKING HARD, AND I HOPE THAT NONE OF OUR  
10:34AM 24 COMMENTS ARE TAKEN TO DEMEAN THE EFFORTS THAT ARE BEING MADE.

10:34AM 25 BUT NOTWITHSTANDING THOSE EFFORTS, I THINK WE HAVE SOME

10:34AM 1 DISTANCE TO GO DOWN THIS ROAD TO GET THERE BY THE END OF THE  
10:34AM 2 YEAR.

10:34AM 3 THE COURT: WELL, THANK YOU, MR. WADE. LET ME  
10:34AM 4 INTERRUPT YOU AGAIN. I APOLOGIZE.

10:34AM 5 I SHOULD HAVE STARTED OFF BY THANKING ALL OF YOU,  
10:34AM 6 INCLUDING THE AGENCIES AND THEIR REPRESENTATIVES WHO ARE ON THE  
10:34AM 7 PHONE. I DO WANT TO THANK YOU FOR MEETING AND CONFERRING. I  
10:34AM 8 KNOW JUDGES DO THAT A LOT, MEET AND CONFER, AND SOMETIMES  
10:34AM 9 PEOPLE THINK, WELL, THAT JUST GETS IT OFF HIS OR HER DESK AND  
10:34AM 10 PUTS IT ON THE LAWYERS TO DO, AND I SUPPOSE THAT'S TRUE TO A  
10:34AM 11 CERTAIN EXTENT.

10:34AM 12 BUT WHEN YOU HAVE GOOD LAWYERS WHO ARE TALENTED, THEY KNOW  
10:34AM 13 THE LAW, AND THEY KNOW WHAT THEY NEED, AND THEY KNOW WHAT THEY  
10:34AM 14 CAN AND CANNOT DO, IT'S EASY TO MAKE THAT REQUEST.

10:34AM 15 YOU'VE DONE THAT. I APPRECIATE IT. TWO HOUR PHONE CALLS.  
10:34AM 16 MY GOODNESS, YOU'VE ACCOMPLISHED A LOT.

10:34AM 17 BUT WHAT I HOPE WE CAN DO THIS MORNING IS TO FINISH UP THE  
10:34AM 18 PATH HERE TO REACH WHAT WE'RE ALL OF COMMON PURPOSE TO GET THIS  
10:35AM 19 DONE SO THAT YOU CAN MOVE FORWARD.

10:35AM 20 SO --

10:35AM 21 MR. WADE: SURE. AND, YOUR HONOR, WE WILL GO  
10:35AM 22 THROUGH -- IF I COULD CATEGORIZE THE DISPUTES IN SORT OF TWO  
10:35AM 23 BUCKETS.

10:35AM 24 ONE BUCKET RELATES TO PRESERVATION ISSUES OR POTENTIAL  
10:35AM 25 DESTRUCTION ISSUES, AND THEN THE SECOND BUCKET WOULD RELATE TO



10:35AM 1 DOCUMENTS THAT STILL NEED TO BE PRODUCED AND THE TIMEFRAME FOR  
10:35AM 2 THAT.

10:35AM 3 IT SOUNDS LIKE ONCE WE CLARIFY SOME SEARCH TERMS AND SOME  
10:35AM 4 OTHER TECHNICAL ISSUES, WE MIGHT BE ABLE TO REACH A RESOLUTION  
10:35AM 5 ON SOME OF THOSE OTHER TECHNICAL ISSUES HERE WITH THE COURT'S  
10:35AM 6 ASSISTANCE.

10:35AM 7 THE MORE SIGNIFICANT CONCERN IS THAT FIRST ISSUE. MS. DAW  
10:35AM 8 FOR THE GOVERNMENT DID PARTICIPATE AND HER ASSISTANCE WAS VERY  
10:35AM 9 HELPFUL IN THE MEET AND CONFER PROCESS.

10:35AM 10 TO HELP CRYSTALLIZE THIS ISSUE, THOUGH, I'M GOING TO POINT  
10:35AM 11 TO TWO EXAMPLES. IF I COULD REFER THE COURT TO DOCUMENT 170,  
10:35AM 12 EXHIBIT A, WHICH IS A LETTER FROM FDA DATED OCTOBER 30TH, 2019.

10:36AM 13 ON THE SECOND PAGE OF THAT LETTER, YOUR HONOR, THERE ARE  
10:36AM 14 SOME TECHNICAL ISSUES IDENTIFIED AND WHICH -- AND THERE ARE A  
10:36AM 15 NUMBER OF BULLET POINTS. IF YOU LOOK AT THE NUMBER, THE BULLET  
10:36AM 16 POINTS THAT EXIST IN THE MIDDLE OF THE PAGE THERE, THE SECOND  
10:36AM 17 BULLET POINT NOTES THAT WITH RESPECT TO 1,114 E-MAILS FOR  
10:36AM 18 MR. GUTIERREZ, IT APPEARS THAT THE DOCUMENTS HAVE NOT BEEN  
10:36AM 19 PRESERVED IN A WAY THAT IS SALVAGEABLE AND THAT THEY'RE ABLE TO  
10:36AM 20 PRODUCE TO THE GOVERNMENT.

10:36AM 21 MR. GUTIERREZ, ACCORDING TO THE GOVERNMENT, WE DON'T  
10:36AM 22 NECESSARILY DISAGREE, IS AMONGST ONE OF THE MOST IMPORTANT  
10:37AM 23 WITNESSES IN THIS CASE. INDEED, WE'VE TALKED ABOUT BRADY  
10:37AM 24 COMING OUT OF THIS PROCESS AND EXCULPATORY INFORMATION COMING  
10:37AM 25 OUT OF THIS PROCESS FOR THE FIRST TIME AS A RESULT OF THE

10:37AM 1 DEFENSE MOTION. MUCH OF THAT MATERIAL RELATES DIRECTLY TO  
10:37AM 2 MR. GUTIERREZ.

10:37AM 3 AND THE PARTIALLY VISIBLE E-MAILS IS INDICIA WITHIN  
10:37AM 4 E-DISCOVERY LINGO FOR DOCUMENTS THAT WERE DELETED BUT COULD  
10:37AM 5 ONLY PARTIALLY BE RESTORED, FRAGMENTS OF THOSE DOCUMENTS COULD  
10:37AM 6 BE RESTORED.

10:37AM 7 SECOND, I NOTE ON THIS, ON THIS PAGE THERE ARE 255  
10:37AM 8 DOCUMENTS FROM MR. GUTIERREZ THAT SEEM TO HAVE KIND OF COME OUT  
10:37AM 9 OF THE BLUE, WHICH IS TROUBLING THAT WE HAVE DOCUMENTS FOR THE  
10:37AM 10 MOST IMPORTANT WITNESS FOR THE FDA APPEARING, YOU KNOW, MONTHS  
10:37AM 11 INTO THIS PROCESS WITHOUT EXPLANATION.

10:38AM 12 WITH RESPECT TO CMS --

10:38AM 13 THE COURT: WELL, WHY DON'T WE --

10:38AM 14 MR. WADE: YES.

10:38AM 15 THE COURT: LET'S TALK ABOUT MR. GUTIERREZ. I WAS  
10:38AM 16 CURIOUS ABOUT WHAT A PARTIAL E-MAIL IS, AND MAYBE, MAYBE I CAN  
10:38AM 17 GET SOME DEFINITION ON THAT.

10:38AM 18 MS. DAW.

10:38AM 19 MS. DAW: ACTUALLY, I THINK THIS IS SOMETHING THAT  
10:38AM 20 THE AGENCY ATTORNEYS MIGHT BE ABLE TO ADDRESS MORE SUCCINCTLY.

10:38AM 21 THE COURT: OKAY. ALL RIGHT. WHO WOULD LIKE TO  
10:38AM 22 TAKE THIS UP? MS. MARTINEZ-RESLY?

10:38AM 23 MS. MARTINEZ-RESLY: YES, YOUR HONOR, THIS IS  
10:38AM 24 MS. MARTINEZ-RESLY.

10:38AM 25 WHAT WE'RE SEEING FOR THESE 1,114 E-MAILS ATTRIBUTABLE TO

MR. GUTIERREZ IS THAT OFTENTIMES A FULL "SUBJECT" LINE,  
SOMETIMES A "FROM" LINE INDICATING WHO SENT THE E-MAIL, AND  
THEN SOMETIMES A "DATE" LINE, SOMETIMES NOT.

WHAT IS CLEAR IS THAT THE "TO" FIELD IS ALMOST ALWAYS  
MISSING AND THE CONTENT, THE BODY CONTENT OF THE E-MAIL IS  
ALMOST ALWAYS MISSING.

SO THAT IS WHAT WE MEAN WHEN WE SAY THERE ARE PARTIALLY  
VISIBLE E-MAILS FOR HIM.

AND I DON'T KNOW IF YOU WOULD LIKE ME TO GO INTO MORE  
DETAIL AS TO WHAT WE'VE DONE ABOUT THOSE OR NOT AT THIS TIME.

THE COURT: HAVE YOU TALKED ABOUT THIS, MR. WADE,  
WITH --

MR. WADE: WE'VE JUST RECEIVED SOME MORE  
INFORMATION. WE RECEIVED INFORMATION IN THE LETTER.

PRESERVATION WAS AN ISSUE THAT WAS DISCUSSED IN THE MEET  
AND CONFER. IT WAS AN ISSUE THAT WAS RAISED BY THE DEFENSE,  
AND THE AGENCIES DIDN'T HAVE A LOT OF IMMEDIATE KNOWLEDGE WITH  
RESPECT TO THAT IN THE MEET AND CONFER PROCESS AND PLEDGED TO  
LOOK INTO IT.

DEFENSE COUNSEL WAS SOMEWHAT SURPRISED BY THAT GIVEN THAT  
IT WAS HARD FOR US TO UNDERSTAND HOW COUNSEL FOR THE GOVERNMENT  
WOULD BE IN A POSITION TO REPRESENT THAT THEY HAD GATHERED AND  
PRODUCED ALL RESPONSIVE DOCUMENTS WHEN THEY DIDN'T KNOW WHETHER  
ALL RESPONSIVE DOCUMENTS HAD ACTUALLY BEEN PRESERVED.

BUT SETTING THAT ASIDE, THIS IS IN ESSENCE ABSENT SOME

10:40AM 1 ABILITY TO REMEDY THIS ISSUE IN ADMISSION THAT MATERIAL  
10:40AM 2 EVIDENCE HAS BEEN DESTROYED.

10:40AM 3 NOT HAVING THE CONTENT OF E-MAILS FROM THE MOST IMPORTANT  
10:40AM 4 WITNESS IN THE CASE SUGGESTS THAT MATERIAL EVIDENCE HAS BEEN  
10:40AM 5 DESTROYED.

10:40AM 6 THE COURT: WELL, WE DON'T KNOW, WE DON'T KNOW WHAT  
10:40AM 7 EVIDENCE HAS BEEN DESTROYED OR NOT. I UNDERSTAND YOUR CONCERN  
10:40AM 8 IT COULD BE A SHOPPING LIST ON AN E-MAIL OR SOMETHING. WE JUST  
10:40AM 9 DON'T KNOW, DO WE?

10:40AM 10 MR. COOPERSMITH: JUST TO ADD, YOUR HONOR, I  
10:40AM 11 THINK --

10:40AM 12 THE COURT: MR. COPPERSMITH.

10:40AM 13 THE CLERK: SPEAK INTO THE MICROPHONE.

10:40AM 14 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

10:40AM 15 THE COURT'S QUESTION I THINK SHOULD BE ANSWERED. IN THE  
10:40AM 16 STATUS REPORT THE GOVERNMENT SAYS THAT THE AGENCY DIDN'T TELL  
10:40AM 17 THE GOVERNMENT THAT MATERIAL HAD BEEN DELETED.

10:40AM 18 I THINK THE FDA COUNSEL ON THE PHONE HAS EXPLAINED WHAT  
10:40AM 19 THEY'RE TRYING TO DO TO RESTORE. SO THAT'S ONE THING.

10:40AM 20 BUT I HAVE NOT HEARD YET AN ANSWER TO THE COURT'S QUESTION  
10:40AM 21 AS TO WHETHER OR NOT MATERIAL IN THE FIRST PLACE WAS DESTROYED  
10:41AM 22 AND WHY.

10:41AM 23 IF THAT'S THE CASE, I THINK THE COURT AND THE PARTIES NEED  
10:41AM 24 TO HAVE A FULL EXPLANATION OF WHAT ACTUALLY OCCURRED HERE,  
10:41AM 25 ESPECIALLY WITH RESPECT TO MR. GUTIERREZ WHO WE AGREE IS AMONG

10:41AM 1 THE MOST IMPORTANT WITNESSES IN THE CASE.

10:41AM 2 THE COURT: OKAY. IT SOUNDS LIKE,

10:41AM 3 MS. MARTINEZ-RESLY, ARE YOU WORKING ON THAT ISSUE, THAT IS,

10:41AM 4 THAT QUESTION?

10:41AM 5 MS. MARTINEZ-RESLY: YES, YES, YOUR HONOR. I WILL

10:41AM 6 ALSO JUST SAY THAT WE HAVE NO EVIDENCE, AND WE HAVE NO REASON

10:41AM 7 TO BELIEVE THAT ANY OF THESE E-MAILS OR ANY OTHER E-MAILS WERE

10:41AM 8 DESTROYED INTENTIONALLY OR INADVERTENTLY.

10:41AM 9 THE EXPLANATION THAT WE HAVE RECEIVED FROM OUR INFORMATION

10:41AM 10 MANAGEMENT PERSONNEL IS THAT THE ORIGINAL E-MAIL CONTAINER

10:41AM 11 FILE, THE PFT FILE THAT HOUSES THESE E-MAILS, WAS CORRUPT. I

10:41AM 12 DON'T THINK -- I DON'T UNDERSTAND THAT AS BEING RELATED TO

10:41AM 13 DELETION OR DESTRUCTION OF DOCUMENTS.

10:41AM 14 THE COURT: OKAY. LET ME -- MR. WADE, YOU CAN

10:42AM 15 CONTROL YOUR ENTHUSIASM FOR JUST A MOMENT.

10:42AM 16 IT SOUNDS LIKE THIS IS SOMETHING THAT IS STILL UNDER

10:42AM 17 INVESTIGATION BY THE AGENCY, AND MY SENSE IS THAT WE'RE NOT

10:42AM 18 GOING TO GET AN ANSWER TO THIS THIS MORNING.

10:42AM 19 MR. WADE: YOUR HONOR, MAYBE WE CAN ADDRESS A COUPLE

10:42AM 20 OF OTHER PRESERVATION ISSUES THAT RELATE TO THE AGENCIES.

10:42AM 21 THE COURT: BECAUSE WHAT --

10:42AM 22 MR. WADE: AND START WITH THE FDA.

10:42AM 23 BUT I THINK THE DIRECT ANSWER TO YOUR QUESTION IS IT

10:42AM 24 APPEARS THAT WE'RE NOT GOING TO RESOLVE THIS THIS MORNING, BUT

10:42AM 25 I THINK IT'S MAYBE THE SINGLE MOST SIGNIFICANT REMAINING ISSUE

10:42AM 1 IN THE CASE AND THE ONE THAT HAS THE ABILITY TO AFFECT THE  
10:42AM 2 RIGHTS OF THE DEFENDANTS, AND, THEREFORE, I WOULD SUGGEST THAT  
10:42AM 3 AN ORDER THAT REQUIRES MORE COMPREHENSIVE DISCLOSURE WITH  
10:42AM 4 RESPECT TO THE EFFORTS THAT WERE MADE TO PRESERVE EVIDENCE AND  
10:42AM 5 CONTEMPORANEOUS DOCUMENTS THAT EVIDENCE THAT IN A DISCLOSURE OF  
10:43AM 6 THAT EVIDENCE IS APPROPRIATE.

10:43AM 7 PART OF THE REASON WHY I ASKED THE COURT TO INDULGE US TO  
10:43AM 8 HEAR THESE ISSUES IN GREATER LENGTH, IF YOU LOOK AT THE THIRD  
10:43AM 9 PAGE, THE FIRST TWO BULLETS ON THE THIRD PAGE SIMILARLY MAKE  
10:43AM 10 CLEAR THAT THERE MAY HAVE WELL BEEN OTHER GAPS WITH RESPECT TO  
10:43AM 11 THE PRESERVATION OF DOCUMENTS.

10:43AM 12 THE AGENCIES DIDN'T KNOW. THERE ARE -- THEY'RE DOING SOME  
10:43AM 13 INVESTIGATION, BUT WHAT THEY DESCRIBED AS THEIR PRESERVATION  
10:43AM 14 EFFORTS RELATED TO A SUBCATEGORY OF DOCUMENTS BUT DID NOT  
10:43AM 15 ADDRESS OTHER CATEGORIES OF DOCUMENTS.

10:43AM 16 SO THIS IS A MAJOR POTENTIAL ISSUE IN THE CASE, AND THE  
10:43AM 17 ENTHUSIASM THAT YOUR HONOR SENSED FROM MY FACE COMES FROM THE  
10:43AM 18 FACT THAT IT'S NOT EVERY DAY THAT I HEAR AN ADMISSION OF A  
10:43AM 19 CORRUPT E-MAIL FILE FROM THE MOST SIGNIFICANT CUSTODIAN IN A  
10:43AM 20 CASE. THAT IS, THAT IS A CORRUPTION, AN EVIDENCE CORRUPTION,  
10:44AM 21 AN EVIDENCE DESTRUCTION ISSUE THAT I THINK IS --

10:44AM 22 THE COURT: I THINK THE TERM "CORRUPTION" -- MAYBE  
10:44AM 23 WE SHOULD BE CLEAR ON THAT.

10:44AM 24 MR. BOSTIC.

10:44AM 25 MR. BOSTIC: YES, YOUR HONOR. FOR THE GOVERNMENT I

1 THINK THE COURT HAS HIT ON AN IMPORTANT DISTINCTION. I HEAR  
2 THE DEFENSE TALKING A LOT ABOUT FAILURE TO PRESERVE AND  
3 EVIDENCE DESTRUCTION, BUT THAT'S SIMPLY NOT WHAT WE'RE HEARING  
4 FROM THE AGENCIES AND THAT'S NOT WHAT WE'RE SEEING OR AT LEAST  
5 THAT'S NOT WHAT THE AGENCIES ARE SEEING. THEY'RE TALKING ABOUT  
6 TECHNICAL ERRORS RELATING TO THE POSSIBLE UNFORTUNATE LOSS OF  
7 SOME POTENTIALLY RESPONSIVE DOCUMENTS IN THIS CASE, BUT THERE'S  
8 A LEAP BETWEEN THAT AND THE ASSUMPTION THAT THE AGENCIES EITHER  
9 FAILED TO FOLLOW THEIR DOCUMENT PRESERVATION PROTOCOLS, OR THAT  
10 THOSE PROTOCOLS WERE INSUFFICIENT, OR THAT THERE WAS SOME KIND  
11 OF NEGLIGENCE OR MALFEASANCE HERE. THERE'S SIMPLY NOT A  
12 SHOWING OF THAT AS EAGER AS THE DEFENSE IS TO GET THERE.

13 THE COURT: I'M SORRY. I DIDN'T MEAN TO INTERRUPT.

14 MR. BOSTIC: I AM SORRY. I ALSO THINK I SHOULD  
15 PROVIDE THE PROSECUTION'S PERSPECTIVE BECAUSE THE DEFENSE HAS  
16 MENTIONED A NUMBER OF TIMES HOW IMPORTANT MR. GUTIERREZ IS TO  
17 THIS CASE.

18 LET ME JUST SAY THAT THE PROSECUTION DOES NOT AGREE THAT  
19 MR. GUTIERREZ IS THE MOST IMPORTANT CASE -- EXCUSE ME, THE MOST  
20 IMPORTANT WITNESS OR DOCUMENT CUSTODIAN IN THIS CASE.

21 I MENTIONED THIS BEFORE, BEFORE THE COURT, BUT THE  
22 INDICTMENT HERE ALLEGES A WIDE RANGE OF MISREPRESENTATIONS THAT  
23 WERE MADE BY THE DEFENDANTS TO VICTIMS, INCLUDING DOCTORS AND  
24 PATIENTS, AS WELL AS THE INVESTORS WHO GAVE MONEY TO THERANOS.

25 REPRESENTATIONS, OR RATHER MISREPRESENTATIONS CONCERNING

1 FDA IS JUST ONE CATEGORY AMONG SEVERAL CATEGORIES OF  
2 MISREPRESENTATIONS THAT THE DEFENDANTS MADE, AND THE NATURE OF  
3 THOSE MISREPRESENTATIONS REGARDING FDA IS IMPORTANT ALSO  
4 BECAUSE THEY RELATE TO DISCREPANCIES BETWEEN WHAT DEFENDANTS  
5 SAID THERANOS WAS REQUIRED TO DO AND WHAT FDA TOLD DEFENDANTS  
6 THAT THERANOS WAS REQUIRED TO DO.

7 NOW, THE GOVERNMENT IS SUPPORTING THE DEFENDANT'S REQUEST  
8 TO GAIN INSIGHT INTO A LOT OF INTERNAL FDA CORRESPONDENCE, BUT  
9 LOOKING AT THE ALLEGATIONS IN THE INDICTMENT, THE IMPORTANT  
10 QUESTION IS WAS THERE A DIFFERENCE BETWEEN WHAT THE FDA TOLD  
11 DEFENDANTS AND WHAT THE DEFENDANTS THEN REPORTED TO OTHERS?

12 FDA'S INTERNAL CORRESPONDENCE ARE A BIG STEP REMOVED FROM  
13 THAT, AND I THINK WE'LL GET LATER INTO ADDITIONAL TOPICS THAT  
14 THE DEFENSE WANTS TO LOOK INTO THAT ARE EVEN FURTHER AFIELD  
15 FROM THAT CENTRAL QUESTION.

16 SO I JUST WANT TO PUT THAT INTO PERSPECTIVE FOR THE COURT.

17 THE COURT: OKAY. THANK YOU.

18 AND WHEN WE TALK ABOUT CORRUPTION, WE'RE TALKING ABOUT  
19 TECHNICAL ELECTRONIC DEVICES THAT HAVE OPERATED INAPPROPRIATELY  
20 IN SOME MANNER FOR SOME REASON.

21 MR. COOPERSMITH: THAT'S MY UNDERSTANDING, YOUR  
22 HONOR, THAT WHEN WE TALK ABOUT CORRUPT FILES, WE'RE TALKING  
23 ABOUT SOME TECHNICAL PROBLEM IN THIS CASE IN RESTORING  
24 MATERIAL.

25 BUT MR. WADE'S COMMENTS, I THINK, ARE CORRECT THAT IN THE



10:46AM 1 WORLD OF E-DISCOVERY, OFTEN WHEN YOU TALK ABOUT CORRUPTED FILES  
10:47AM 2 OR NEED-TO-RESTORE FILES, IT'S POSSIBLE, AND OFTEN LIKELY, THAT  
10:47AM 3 WE'RE TALKING ABOUT MATERIAL THAT WAS ORIGINALLY DELETED.

10:47AM 4 SO I UNDERSTAND MR. BOSTIC'S POINT, AND, YOU KNOW, WISHFUL  
10:47AM 5 THINKING IS THAT THIS IS NOT THAT, BUT I STILL HAVE NOT HEARD  
10:47AM 6 ANY EXPLANATION, AND I DON'T KNOW THAT WE'LL GET THIS TODAY, AS  
10:47AM 7 TO WHY THESE FILES WERE, YOU KNOW, CORRUPTED, IF YOU WILL, OR  
10:47AM 8 HAVE THESE TECHNICAL GLITCHES.

10:47AM 9 THE COURT: SURE.

10:47AM 10 MR. COOPERSMITH: OFTEN WE SAY THEY ARE.

10:47AM 11 SO I KNOW THAT IT'S POSSIBLE FROM EXPERIENCE THAT A  
10:47AM 12 FORENSIC INVESTIGATION CAN DETERMINE OFTEN WHAT HAPPENED IN THE  
10:47AM 13 FIRST PLACE, AND THAT'S THE EXPLANATION THAT I THINK WE ALL ARE  
10:47AM 14 NOT HEARING TODAY.

10:47AM 15 THE COURT: AND MY SENSE IS THAT MS. MARTINEZ-RESLY  
10:47AM 16 IS NOT ABLE TO GIVE US THE ANSWER TO THAT QUESTION THIS  
10:47AM 17 MORNING. I THINK SHE SUGGESTED THAT THERE IS SOME ONGOING  
10:47AM 18 REVIEW OF THIS IN HER AGENCY, AND I'M TRUSTING THAT SHE'S GOING  
10:47AM 19 TO ENGAGE THE PROPER RESOURCES IN HER OFFICE TO FIND OUT WHAT  
10:47AM 20 HAPPENED, AND WHEN IT HAPPENED, AND WHEN IT DID HAPPEN WHAT  
10:48AM 21 ITEMS, DOCUMENTS, DID IT AFFECT, IF ANY.

10:48AM 22 THAT'S A SEPARATE -- LET'S JUST PUT THAT AS A SEPARATE  
10:48AM 23 LINE ITEM THAT IS SEPARATE FROM DISCLOSURE. I'VE TALKED ABOUT  
10:48AM 24 DISCLOSURE BY THE END OF THE YEAR, WHICH I'M SERIOUS ABOUT.

10:48AM 25 THIS INVESTIGATION, AND MS. MARTINEZ-RESLY, IF YOU COULD

10:48AM 1 MAKE A NOTE, I'M GOING TO ASK YOU AT SOME PART OF OUR  
10:48AM 2 CONVERSATION THIS MORNING WHEN YOU THINK YOU'LL HAVE THAT  
10:48AM 3 ACCOMPLISHED SUCH THAT YOU CAN REPORT TO THESE LAWYERS AND TO  
10:48AM 4 THE COURT THE STATUS. THAT'S GOING TO BE AN IMPORTANT ISSUE.

10:48AM 5 SO I THINK THAT'S ABOUT ALL WE CAN DO ON THAT NOW.

10:48AM 6 MR. WADE, ANYTHING ELSE YOU WANT TO TALK ABOUT?

10:48AM 7 MR. WADE: NO. I THINK THAT'S APPROPRIATE, YOUR  
10:48AM 8 HONOR.

10:48AM 9 THE ONLY THING I WOULD NOTE IS, BECAUSE IT'S DIRECTLY  
10:48AM 10 RELATED TO THAT ISSUE, IF THE COURT WERE TO LOOK AT THE FIRST  
10:48AM 11 TWO BULLETS ON PAGE 3, THEY SIMILARLY TALK ABOUT WHETHER OR NOT  
10:48AM 12 THERE WAS ADEQUATE PRESERVATION OF HARD COPY DOCUMENTS THAT  
10:49AM 13 EXISTED, WHAT STEPS WERE TAKEN WHEN PEOPLE SUCH AS  
10:49AM 14 MR. GUTIERREZ LEFT THE AGENCY, AND WHETHER THAT EVIDENCE STILL  
10:49AM 15 EXISTS.

10:49AM 16 AND THE FDA WAS NOT ABLE TO ANSWER THAT DURING OUR MEET  
10:49AM 17 AND CONFER PROCESS. THE CORRESPONDENCE ATTACHED AS EXHIBIT A  
10:49AM 18 SAYS THAT THEY'RE IN THE PROCESS OF GATHERING THAT.

10:49AM 19 THE COURT: RIGHT.

10:49AM 20 MR. WADE: I GUESS THE POINT I WOULD LIKE TO BE MADE  
10:49AM 21 AS THE COURT ADDRESSES THIS ISSUE, GIVEN THE TIMING THAT WE'RE  
10:49AM 22 UNDER HERE, IS THAT THAT -- THOSE DISCLOSURES HAPPEN MORE  
10:49AM 23 QUICKLY WITH REGARD TO THE PRESERVATION OF EVIDENCE BECAUSE WE  
10:49AM 24 WON'T KNOW WHETHER WE HAVE EVERYTHING OR WHETHER THE MISSING  
10:49AM 25 ITEMS HAVE SIGNIFICANCE IN THE CASE THAT, FOR EXAMPLE, COULD

10:49AM 1 RELATE TO MOTIONS OR COULD RELATE TO OTHER ISSUES IN THE CASE  
10:49AM 2 UNTIL WE HAVE THIS INFORMATION.

10:49AM 3 MY EXPECTATION WOULD BE -- UNFORTUNATELY, I THINK WE'RE  
10:49AM 4 GOING TO HAVE TO GET THIS INFORMATION AND THEN MEET AND CONFER  
10:50AM 5 AGAIN, AND THIS IS A SEPARATE PROCESS BECAUSE --

10:50AM 6 THE COURT: RIGHT.

10:50AM 7 MR. WADE: -- IT APPEARS THAT THE AGENCIES HAD NOT  
10:50AM 8 ADDRESSED THIS DURING THEIR COLLECTION EFFORTS IN THE FIRST  
10:50AM 9 INSTANCE.

10:50AM 10 THE COURT: RIGHT. AND I DON'T REMEMBER IN THE  
10:50AM 11 PLEADINGS WHETHER THERE WAS A TIME STAMP AS TO WHEN THIS WAS  
10:50AM 12 REALIZED WHEN THIS ISSUE AROSE.

10:50AM 13 BUT IN ANY EVENT, WHAT I'VE TOLD MS. MARTINEZ-RESLY, I'M  
10:50AM 14 GOING TO TASK HER WITH TELLING US WHEN SHE THINKS SHE CAN HAVE  
10:50AM 15 A REPORT ON THE PROGRESS OF THIS.

10:50AM 16 AND ALSO, MS. MARTINEZ-RESLY, AS TO WHAT INFORMATION YOU  
10:50AM 17 CAN RELEASE TO THE LAWYERS, BOTH SIDES, AS TO THE PROTOCOL  
10:50AM 18 INVOLVING RETENTION, HOW THAT IS DONE AND WHETHER OR NOT --  
10:50AM 19 WHETHER ALL OF THOSE PROCEDURES WERE ENGAGED IN REGARDS TO  
10:50AM 20 MR. GUTIERREZ'S E-MAILS.

10:50AM 21 MR. WADE: AND MORE GENERALLY, YOUR HONOR, AS THE  
10:50AM 22 TWO BULLET POINTS NOTE, IT'S NOT -- MR. GUTIERREZ IS A SPECIFIC  
10:51AM 23 EXAMPLE WHERE WE KNOW THAT THERE WERE E-MAILS THAT ARE  
10:51AM 24 CORRUPTED. I DON'T MEAN TO SUGGEST THAT ANYONE ACTED  
10:51AM 25 CORRUPTLY.

10:51AM 1 THE COURT: NO. WE'RE IN SILICON VALLEY. IT'S A  
10:51AM 2 TERM OF ART. I THINK WE UNDERSTAND THAT.

10:51AM 3 SO THAT'S A SEPARATE ISSUE THAT IS GOING TO BE ENGAGED  
10:51AM 4 HERE, AND WE'LL HAVE A SEPARATE REPORT ON THAT.

10:51AM 5 ANYTHING FURTHER ON THIS? MR. COPPERSMITH?

10:51AM 6 MR. COOPERSMITH: NO, YOUR HONOR.

10:51AM 7 THE COURT: MR. BOSTIC, ANYTHING FURTHER ON THIS?

10:51AM 8 MS. DAW, ANYTHING FURTHER ON THIS?

10:51AM 9 MR. BOSTIC: YOUR HONOR, FOR THE PROSECUTION, I'LL  
10:51AM 10 HAVE SOME ADDITIONAL THOUGHTS ABOUT THE COURT'S PLAN TO IMPOSE  
10:51AM 11 A RULE 16 OBLIGATION ON THE GOVERNMENT, BUT IT MIGHT MAKE SENSE  
10:51AM 12 TO SAVE THOSE THOUGHTS UNTIL AFTER WE HAVE DISCUSSED THE  
10:51AM 13 SPECIFIC ISSUE.

10:51AM 14 THE COURT: RIGHT. LET'S SEE HOW BIG THE JOB IS.

10:51AM 15 OKAY. WHAT'S NEXT?

10:51AM 16 MR. WADE: RELATED ISSUE ON THE PRESERVATION ISSUE  
10:51AM 17 BEFORE GOING INTO THE SPECIFICS ON MISSING OR EVIDENCE THAT IS  
10:51AM 18 SORT OF IN PROCESS.

10:51AM 19 THERE'S A SIMILAR ISSUE WITH RESPECT TO CMS. I BELIEVE  
10:52AM 20 CMS IS IN THE PROCESS OF INVESTIGATING THEIR PRESERVATION  
10:52AM 21 EFFORTS.

10:52AM 22 THE COURT MAY REMEMBER ON A PRIOR OCCASION THAT WE HAD  
10:52AM 23 DISCUSSED THERE WAS A PRIOR INSPECTION FROM CMS THAT OCCURRED  
10:52AM 24 AT THERANOS EARLIER IN TIME AND THAT THAT HAD GIVEN THERANOS  
10:52AM 25 SORT OF A CLEAN BILL OF HEALTH AT THAT TIME.

10:52AM 1 SO FAR WE HAVE NOT SEEN DOCUMENTS RELATING TO THAT WHICH  
10:52AM 2 IS CONCERNING TO THE DEFENSE. OUR HOPE -- WE HAVE RAISED THAT  
10:52AM 3 ISSUE A NUMBER OF TIMES. WE'VE MET AND CONFERRED ABOUT THE  
10:52AM 4 PRESERVATION ISSUES WITH THE AGENCIES, AND OUR HOPE WOULD BE  
10:52AM 5 THAT WE CAN RECEIVE SIMILAR UPDATES FROM THE AGENCIES WITH  
10:52AM 6 RESPECT TO THE PRESERVATION EFFORTS THAT THEY MADE, CMS MADE  
10:52AM 7 WITH RESPECT TO THOSE MATERIALS AND OTHERWISE.

10:52AM 8 THE COURT: OKAY. MS. TURNER, DO YOU WISH TO BE  
10:52AM 9 HEARD ON THIS?

10:52AM 10 MS. TURNER: YES, YOUR HONOR.

10:53AM 11 I DON'T SEE ANY PROBLEM WITH PROVIDING AN UPDATE ON THAT  
10:53AM 12 ISSUE ONCE WE HAVE SOME ADDITIONAL INFORMATION. I HAVE BEEN  
10:53AM 13 LOOKING INTO IT, AND I JUST HAVEN'T HAD -- I DON'T HAVE ALL OF  
10:53AM 14 THE INFORMATION NECESSARY TO REPORT BACK AT THIS MOMENT.

10:53AM 15 THE COURT: OKAY. MR. COPPERSMITH, ANYTHING YOU  
10:53AM 16 WANT TO ADD?

10:53AM 17 MR. COOPERSMITH: NOTHING ON THAT POINT.

10:53AM 18 THE COURT: OKAY. DOES THIS INCLUDE THE CMS  
10:53AM 19 FOLLOWUP TO THE NON-MAIL HARD COPIES? IS THIS THE SAME ISSUE  
10:53AM 20 OR THIS A SEPARATE ISSUE?

10:53AM 21 MR. WADE: I THINK IT'S A DIRECTLY RELATED ISSUE,  
10:53AM 22 YOUR HONOR.

10:53AM 23 THE COURT: RIGHT, RIGHT.

10:53AM 24 MR. WADE: AT THE TIME WE MET AND CONFERRED, AGENCY  
10:53AM 25 COUNSEL WAS NOT SURE WHETHER HARD DOCUMENTS HAD BEEN COLLECTED

10:53AM 1 AND PRODUCED. THEY AGREED THAT THEY HAD BEEN FOCUSSED ON THE  
10:53AM 2 E-MAIL.

10:53AM 3 THE COURT: SURE.

10:53AM 4 MR. WADE: SO THEY PLEDGED TO GO BACK AND MAKE  
10:53AM 5 INQUIRIES ON THAT.

10:53AM 6 THE COURT: GREAT.

10:53AM 7 MR. COOPERSMITH: YOUR HONOR, I DO HAVE ONE FOLLOWUP  
10:54AM 8 ON THAT. IN ADDITION TO THE HARD COPY -- ONE QUESTION THAT I  
10:54AM 9 HAVE NOT HEARD AN ANSWER TO IS THAT WE HAVE REASON TO BELIEVE  
10:54AM 10 THAT THE AGENCY'S PERSONNEL, ESPECIALLY CMS BUT IT COULD BE  
10:54AM 11 BOTH, WERE ALSO INVOLVED IN TEXT MESSAGING, A COMMON FORM OF  
10:54AM 12 COMMUNICATION IN THIS DAY AND AGE, AND WE HAVE NOT SEEN ANY  
10:54AM 13 TEXT MESSAGES FROM EITHER AGENCY.

10:54AM 14 WE WOULD HOPE THAT AS PART OF THEIR PROTOCOL THEY WOULD  
10:54AM 15 ALSO BE SEARCHING FOR TEXT MESSAGE INFORMATION BECAUSE IN  
10:54AM 16 PARTICULAR, YOUR HONOR, DURING THE INSPECTION OF THERANOS THAT  
10:54AM 17 CMS CARRIED OUT, WE BELIEVE THAT THEY WERE USING TEXT MESSAGE  
10:54AM 18 COMMUNICATIONS.

10:54AM 19 THE COURT: OKAY.

10:54AM 20 MR. BOSTIC: YOUR HONOR, APOLOGIES TO GO BACK ONE  
10:54AM 21 STEP JUST TO MAKE SURE THE RECORD IS ACCURATE ON THE ISSUE OF  
10:54AM 22 CMS HARD COPY DOCUMENTS.

10:54AM 23 MR. WADE JUST LEFT OUT ONE DETAIL, WHICH IS THAT ALTHOUGH  
10:54AM 24 THE AGENCY COUNSEL DID NOT HAVE IMMEDIATE ANSWER AT THE TIME OF  
10:54AM 25 OUR MEET AND CONFER CALL, THE AGENCY LATER FOLLOWED UP TO BOTH

10:55AM 1 PARTIES AND CONFIRMED THAT IT BELIEVES THAT THE MAJORITY OF  
10:55AM 2 HARD COPY DOCUMENTS WOULD HAVE BEEN CAPTURED, COLLECTED, AND  
10:55AM 3 PRODUCED TO THE PROSECUTION BACK IN 2017 SUCH THAT ALL OF THOSE  
10:55AM 4 DOCUMENTS WOULD HAVE BEEN PRODUCED.

10:55AM 5 THE COURT: I SAW THAT IN YOUR RESPONSE IN THAT AND  
10:55AM 6 MY SENSE WAS -- I WAS GOING TO ASK ABOUT THAT -- MY SENSE IS  
10:55AM 7 THAT THOSE DOCUMENTS THAT THE GOVERNMENT HAS RECEIVED,  
10:55AM 8 MR. BOSTIC, YOU HAVE PROVIDED THOSE ALREADY?

10:55AM 9 MR. BOSTIC: YES, YOUR HONOR.

10:55AM 10 MR. WADE: THEY HAVE, YOUR HONOR. THE ONLY POINT OF  
10:55AM 11 DISAGREEMENT THERE IS MAJORITY IN OUR MINDS IS NOT SUFFICIENT  
10:55AM 12 TO MEET THE REQUIREMENT. SO WE WOULD RESPECT THE ENTIRETY OF  
10:55AM 13 IT.

10:55AM 14 THE COURT: AND WHEN YOU SAY, "TEXT MESSAGES," I'M  
10:55AM 15 JUST TRYING TO GATHER YOU'RE TALKING ABOUT INDIVIDUALS -- ARE  
10:55AM 16 YOU TALKING ABOUT WORK PHONES, THAT IS, BUSINESS RELATED  
10:55AM 17 PHONES? ARE YOU TALKING ABOUT PERSONAL PHONE TEXTS?

10:55AM 18 MR. COOPERSMITH: YES, YOUR HONOR. YES, WE'RE  
10:55AM 19 TALKING ABOUT PERSONNEL WHO WORKED FOR THE AGENCIES WHO HAVE  
10:55AM 20 EITHER PERSONAL OR BUSINESS PHONES, BUT THE TEXT MESSAGES WE'RE  
10:55AM 21 LOOKING FOR OBVIOUSLY ARE TEXT MESSAGES ABOUT CMS OR FDA  
10:56AM 22 BUSINESS THAT RELATE TO THERANOS.

10:56AM 23 SO WE'RE NOT LOOKING FOR THE PERSONAL TEXT MESSAGES OF  
10:56AM 24 INDIVIDUAL EMPLOYEES. WE'RE LOOKING FOR THEIR TEXT MESSAGES  
10:56AM 25 ABOUT THE BUSINESS THAT THEY'RE IN, WHICH IS REGULATION.

10:56AM 1 THE COURT: HOW DO YOU -- WHAT IS THE SCOPE OF THAT?  
10:56AM 2 AND BY "THAT" I MEAN ARE YOU LOOKING AT PEOPLE WHO WOULD BE  
10:56AM 3 PARTICULARLY INVOLVED WITH THERANOS AND WHATEVER THE AGENCY  
10:56AM 4 REGULATION? ARE YOU LOOKING FOR PEOPLE WHO ARE NOT INVOLVED  
10:56AM 5 BUT, YES, ARE SOMEHOW COMMENTING ABOUT IT JUST AS A PERSONAL  
10:56AM 6 OBSERVATION? HOW DO YOU FILTER THAT?

10:56AM 7 MR. COOPERSMITH: WELL, YOUR HONOR, I THINK THE  
10:56AM 8 STARTING POINT FOR LOOKING AT THIS AND PROBABLY THE BULK OF THE  
10:56AM 9 INFORMATION IS, FOR EXAMPLE, WHEN CMS PERSONNEL ARE ON THE  
10:56AM 10 GROUND AT THERANOS CONDUCTING AN INSPECTION AND THEY'RE TEXT  
10:56AM 11 MESSAGING ABOUT WHAT THEY'RE DOING OR ASKING FOR GUIDANCE, OR  
10:56AM 12 EVEN COMMENTING ABOUT WHAT THEY'RE SEEING, THAT WOULD BE  
10:56AM 13 DIRECTLY RESPONSIVE.

10:56AM 14 AND WE HOPE THAT THAT MATERIAL WOULD HAVE BEEN PRESERVED  
10:57AM 15 IN ACCORDANCE WITH THE GOVERNMENT'S DIRECTION BACK IN 2017.

10:57AM 16 BUT WHATEVER EXISTS NOW WE WOULD EXPECT TO BE PRODUCED.

10:57AM 17 THE BROADER QUESTION THAT YOUR HONOR IS ASKING, I  
10:57AM 18 UNDERSTAND, IS THAT IS IT POSSIBLE THAT SOME RANDOM EMPLOYEE OF  
10:57AM 19 THESE AGENCIES, YOU KNOW, TEXTED AND JUST HAD AN OBSERVATION  
10:57AM 20 ABOUT WHAT THEY SAW IN THE NEWS MEDIA, OR SOMETHING LIKE THAT?

10:57AM 21 THAT'S NOT REALLY WHAT WE'RE ASKING FOR.

10:57AM 22 THE COURT: SURE.

10:57AM 23 MR. COOPERSMITH: ALTHOUGH YOU CAN IMAGINE THAT THAT  
10:57AM 24 COULD BE RELEVANT, BUT IT'S HARDER TO GET AT, RIGHT?

10:57AM 25 WHAT WE'RE REALLY LOOKING FOR, THE CORE OF IT IS TEXT



10:57AM 1 MESSAGING. JUST LIKE PEOPLE SEND E-MAILS, PEOPLE SEND TEXTS.

10:57AM 2 THE COURT: NO, I UNDERSTAND. I CAPTURE THAT. I

10:57AM 3 KNOW YOU'RE LOOKING AT ME LIKE AN OLD GUY LIKE YOU, JUDGE,

10:57AM 4 DOESN'T UNDERSTAND TEXTING.

10:57AM 5 MR. COOPERSMITH: I'M NOT SO YOUNG MYSELF THESE

10:57AM 6 DAYS, YOUR HONOR.

10:57AM 7 THE COURT: MS. DAW.

10:57AM 8 MS. DAW: YOUR HONOR, A COUPLE OF POINTS.

10:57AM 9 FIRST IS ACCESS. IF INDIVIDUALS USE THEIR PERSONAL

10:57AM 10 CELL PHONES AND THEY'RE NO LONGER AT THE AGENCY, EVEN IF THEY

10:57AM 11 ARE AT THE AGENCY, I QUESTION WHETHER THE AGENCY HAS ANY LEGAL

10:58AM 12 OBLIGATION OR ANY LEGAL RIGHT TO ACCESS THEIR CELL PHONES.

10:58AM 13 THE OTHER POINT THAT I WANTED TO MAKE HAS TO DO WITH THE

10:58AM 14 INSISTENCE THAT CMS IS PRESENT AT THERANOS. THE INSPECTIONS

10:58AM 15 THAT ARE DONE IN THE FIELD ARE DONE BY THE STATE OF CALIFORNIA

10:58AM 16 AS A CONTRACTOR OF CMS, NOT BY CMS ITSELF.

10:58AM 17 MS. TURNER CAN CORRECT ME IF I'M WRONG, BUT THAT CAN

10:58AM 18 EXPLAIN ALSO WHY CMS DOESN'T HAVE AS MANY DOCUMENTS AS DEFENSE

10:58AM 19 COUNSEL SEEMS TO THINK THAT THEY SHOULD WITH RESPECT TO THOSE

10:58AM 20 INSPECTIONS BECAUSE THEY DIDN'T PERFORM THEM.

10:58AM 21 THEY'RE PERFORMED BY, AS I SAID, BY CONTRACTORS, AND THE

10:58AM 22 AGENCY MAY OR MAY NOT RECEIVE A REPORT, BUT THEY DON'T DO THE

10:58AM 23 INSPECTIONS THEMSELVES.

10:58AM 24 THE COURT: OKAY.

10:58AM 25 MR. COOPERSMITH: JUST TO CORRECT THE RECORD ON

10:58AM 1 THAT, YOUR HONOR, IN 2015, IN SEPTEMBER 2015 CMS SENT THEIR OWN  
10:58AM 2 PERSONNEL, NOT THE STATE OF CALIFORNIA, THEY SENT THEIR OWN  
10:59AM 3 PERSONNEL TO DO THE INSPECTION.

10:59AM 4 SO THERE ARE OTHER TIMES THAT STATE THEY HAVE DONE IT, BUT  
10:59AM 5 BUT THERE ARE TIMES WHEN CMS DIRECTLY DID IT.

10:59AM 6 THE COURT: OKAY.

10:59AM 7 MR. COOPERSMITH: SO I'M SURE MS. DAW DIDN'T KNOW  
10:59AM 8 THAT, BUT THAT'S ACTUALLY THE CASE.

10:59AM 9 THE COURT: OKAY. SO GETTING BACK TO THE BROADNESS  
10:59AM 10 OF THE TEXTS, WHICH IS WHAT I WAS CONCERNED ABOUT, IT WOULD  
10:59AM 11 PROBABLY BE RELATIVELY EASY TO IDENTIFY WHAT CMS PEOPLE WERE ON  
10:59AM 12 THE GROUND DOING DIRECT WORK IN REGARDS TO THERANOS, ET CETERA,  
10:59AM 13 AND YOU CAN CERTAINLY LOOK FOR TEXT MESSAGES FOR THAT  
10:59AM 14 POPULATION.

10:59AM 15 MR. WADE: YES, YOUR HONOR. ORDINARILY WHEN YOU DO  
10:59AM 16 A COLLECTION OF THIS KIND, YOU CONDUCT SORT OF A MINI INTERVIEW  
10:59AM 17 OF EACH CUSTODIAN AND YOU SAY WHAT E-MAILS DO YOU HAVE? WHAT  
10:59AM 18 DOCUMENTS DO YOU HAVE? DID YOU USE YOUR PHONE? DID YOU SEND  
10:59AM 19 TEXTS? IT'S SOMETHING THAT WE DO ROUTINELY EVERY DAY. IT'S  
10:59AM 20 NOT A PARTICULARLY SIGNIFICANT TASK.

10:59AM 21 THE COURT: RIGHT. AND I'M HAVING THIS DRAWN-OUT  
10:59AM 22 DISCUSSION NOT BECAUSE, AGAIN, MR. COPPERSMITH, I DON'T  
11:00AM 23 UNDERSTAND THE TECHNOLOGY, BUT I WANT TO NARROW DOWN SO WE  
11:00AM 24 DON'T HAVE TO DEAL WITH THIS AT SOME TIME IN THE FUTURE.

11:00AM 25 MR. COOPERSMITH: YES, YOUR HONOR. I THINK THAT'S

11:00AM 1 HOW YOU WOULD NARROW IT.

11:00AM 2 I SHOULD POINT OUT IT'S REALLY BOTH AGENCIES BECAUSE FDA  
11:00AM 3 ALSO CONDUCTED AN INSPECTION OF THERANOS IN AUGUST OF 2015. SO  
11:00AM 4 IT'S BOTH AGENCIES, NOT JUST CMS.

11:00AM 5 THE COURT: YES. SHOULD WE MOVE ON FROM TEXTING TO  
11:00AM 6 SOMETHING ELSE?

11:00AM 7 MR. WADE: YES, YOUR HONOR.

11:00AM 8 I THINK IF WE WERE TO WORK PERHAPS OFF OF PAGE 9 OF THE  
11:00AM 9 JOINT STATUS MEMORANDA WHERE WE IDENTIFY ISSUES, MAYBE THAT'S A  
11:00AM 10 GOOD STARTING POINT TO TRY TO BRING SOME CLARITY.

11:00AM 11 THE COURT: SURE.

11:00AM 12 MR. WADE: AND I THINK WITH RESPECT TO CMS, I THINK  
11:00AM 13 WE'VE MADE SOME PROGRESS ALREADY EVEN THOUGH WE HAVEN'T BEEN  
11:00AM 14 WORKING DOWN THE LIST BECAUSE WE UNDERSTAND THAT THEY'RE GOING  
11:00AM 15 TO MAKE INQUIRIES AND PROVIDE DISCLOSURES WITH RESPECT TO THEIR  
11:00AM 16 EFFORTS TO COLLECT AND PRODUCE AND PRESERVE ALL RELEVANT  
11:01AM 17 EVIDENCE.

11:01AM 18 THE COURT: I THINK WE JUST TALKED ABOUT THAT  
11:01AM 19 EARLIER.

11:01AM 20 MR. WADE: YES.

11:01AM 21 THE COURT: I THINK WHAT WE HAVEN'T TALKED ABOUT IS  
11:01AM 22 THIS 2010-2013 TIME PERIOD.

11:01AM 23 MR. WADE: YOUR HONOR, I THINK THAT ISSUE IS  
11:01AM 24 RESOLVED TO THE EXTENT THAT THE DOCUMENTS HAVE BEEN PRESERVED,  
11:01AM 25 AND WE'LL LEARN THAT. AS A RESULT OF THEIR DISCLOSURES, I

11:01AM 1 THINK THAT ISSUE IS IN PROCESS.

11:01AM 2 THE COURT: GREAT.

11:01AM 3 MR. WADE: THEY'VE GATHERED THAT MATERIAL AND ARE IN  
11:01AM 4 THE PROCESS OF REVIEWING THAT MATERIAL. SO I THINK WE HAVE  
11:01AM 5 MADE PROGRESS.

11:01AM 6 THE ISSUE THAT REMAINS AS OF THE DRAFTING OF THE STATUS  
11:01AM 7 REPORT IS WHEN ARE WE GOING TO GET IT? I UNDERSTAND THE COURT  
11:01AM 8 HAS AN ANSWER TO THAT QUESTION.

11:01AM 9 THE COURT: YES. THAT WILL BE ANSWERED AT THE END  
11:01AM 10 OF OUR CONVERSATION. GREAT.

11:01AM 11 SHOULD WE MOVE TO FDA THEN?

11:01AM 12 MR. WADE: YES, YOUR HONOR. WORKING DOWN THOSE  
11:02AM 13 LISTS. SIMILARLY ITEM 1, (B)1 ON PAGE 9 OF DOCUMENT 170  
11:02AM 14 IDENTIFIES PRESERVATION ISSUES. I THINK WE'VE ADDRESSED THAT,  
11:02AM 15 YOUR HONOR.

11:02AM 16 ITEM 2 RELATES TO THE MANNER OF COLLECTION AND ACQUISITION  
11:02AM 17 OF RESPONSIVE DOCUMENTS, INCLUDING E-MAILS THAT -- THE ISSUE  
11:02AM 18 HERE, YOUR HONOR, IS OUR UNDERSTANDING IS THAT THE AGENCY  
11:02AM 19 COUNSEL JUST ASKED CUSTODIANS TO GATHER THE DOCUMENTS THAT THEY  
11:02AM 20 THOUGHT WERE RESPONSIVE TO THE REQUESTS, AND THEY TOOK WHAT  
11:02AM 21 THEY RECEIVED AND TURNED THEM OVER WHICH IS NOT IN KEEPING WITH  
11:02AM 22 THE STANDARD OF CARE FOR A DOCUMENT COLLECTION EFFORT.

11:02AM 23 ORDINARILY, INQUIRIES NEED TO BE MADE AND YOU NEED TO MAKE  
11:02AM 24 ASSURANCES THAT MATERIALS BEING PROVIDED, IN THE CASE OF AN  
11:03AM 25 E-MAIL YOU DO A SEARCH LIKE THEY'RE DOING IN OTHER PORTIONS OF

11:03AM 1 THEIR COLLECTION.

11:03AM 2 THE COURT: SO WHAT IS IT YOU WOULD LIKE IN REGARDS  
11:03AM 3 TO UNION NUMBER 2 HERE? YOU'VE IDENTIFIED AN ISSUE THAT YOU  
11:03AM 4 HAVE CONCERNS ABOUT.

11:03AM 5 MR. WADE: WE WOULD LIKE AGENCY COUNSEL TO FOLLOW UP  
11:03AM 6 WITH THE RELEVANT CUSTODIANS AND MAKE INQUIRIES PERHAPS WITH  
11:03AM 7 THE PROSECUTION TEAM TO MAKE SURE THAT THEY HAVE ACTUALLY  
11:03AM 8 GATHERED ALL OF THE DOCUMENTS THAT ARE RESPONSIVE TO THE SIX  
11:03AM 9 REQUESTS.

11:03AM 10 THE COURT: OKAY. MR. BOSTIC, DO YOU WANT TO BE  
11:03AM 11 HEARD ON THIS?

11:03AM 12 MR. BOSTIC: YES, YOUR HONOR.

11:03AM 13 THE COURT: MR. BOSTIC, I APOLOGIZE IN ADVANCE. I  
11:03AM 14 HAVE A TENDENCY TO INTERRUPT PEOPLE. I ASK A QUESTION, AND  
11:03AM 15 THEN I GIVE AN ANSWER, AND THEN ASK YOU FOR YOUR ANSWER.

11:03AM 16 SO WHAT -- MY INTENT IN ENJOINING YOU WITH THE RULE 16  
11:03AM 17 TYPE OF ISSUE IS THAT THIS IS EXACTLY THE TYPE OF ISSUE THAT I  
11:03AM 18 THOUGHT YOUR OFFICE MIGHT BE OF ASSISTANCE TO GIVE SOME  
11:04AM 19 GUIDANCE AS TO THAT TENSION THAT I TALKED ABOUT WITH CRIMINAL  
11:04AM 20 DISCOVERY AND WHAT IS REALLY REQUIRED AND WHAT IS NOT.

11:04AM 21 YOUR EXPERTISE, I THINK, WOULD BE VALUABLE TO GIVE  
11:04AM 22 GUIDANCE TO THE AGENCIES, NOT JUST FDA BUT CMS AND OTHERS, AS  
11:04AM 23 TO WHAT REALLY NEEDS TO BE DONE, HOW TO DO IT, AND SUGGESTIONS  
11:04AM 24 ON HOW TO ACCOMPLISH THAT.

11:04AM 25 MR. BOSTIC: YES, YOUR HONOR. THANK YOU.

1 THE AGENCIES, I THINK AS THEY CONFIRMED, HAVE HAD THE  
2 BENEFIT OF THE PROSECUTION'S GUIDANCE ON THOSE ISSUES. THEY  
3 WILL CONTINUE TO HAVE IT REGARDLESS OF WHAT THE COURT ORDERS  
4 TODAY. I CAN ASSURE THE COURT THAT THE GOVERNMENT WILL STAY AS  
5 INVOLVED AS IT CAN BE IN FACILITATING THE PRODUCTION OF THESE  
6 DOCUMENTS BY THE AGENCIES TO THE DEFENSE.

7 THE COURT: OKAY.

8 MR. BOSTIC: ON SPECIFIC QUESTIONS, THOUGH, LIKE HOW  
9 THE AGENCY GOES ABOUT COLLECTING DOCUMENTS, ONE POINT I'LL  
10 RAISE IS THAT THE DEFENSE DOES CITE AN UNPUBLISHED CASE FROM  
11 ANOTHER DISTRICT FOR THE PROPOSITION THAT THIS MAY NOT BE THE  
12 BEST WAY FOR DOCUMENT CUSTODIANS TO RESPOND TO REQUESTS.

13 I DON'T THINK THAT IS BINDING ON THIS COURT, OF COURSE.  
14 AND WHILE IT MAY BE TRUE THAT FOR SOME DOCUMENT CUSTODIANS MORE  
15 INVOLVEMENT IS NECESSARY, WE ARE DEALING WITH HIGH-LEVEL  
16 EMPLOYEES AT A GOVERNMENT AGENCY HERE, EMPLOYEES IN AN AGENCY  
17 WHO ARE USED TO DEALING WITH DOCUMENT REQUESTS IN THE FOIA  
18 CONTEXT. AND IN THE LITIGATION CONTEXT, AND OCCASIONALLY IN  
19 THE CRIMINAL PROSECUTION CONTEXT.

20 SO I DON'T THINK WE SHOULD ACCEPT THE DEFENSE'S ARGUMENT  
21 THAT THIS IS PER SE UNACCEPTABLE, THAT YOU GO TO A SPECIFIC  
22 CUSTODIAN WHO KNOWS HIS OR HER OWN DOCUMENTS BETTER THAN ANYONE  
23 ELSE AND ASK THEM TO MAKE A GOOD FAITH EFFORT TO CAPTURE  
24 EVERYTHING RESPONSIVE, AND TURN IT OVER, AND THEN TRUST IN  
25 THEIR GOOD FAITH EFFORTS TO DO THAT.

11:05AM 1 THAT IS NOT UNUSUAL FOR HOW DISCOVERY WORKS. EVEN WHEN  
11:05AM 2 THE GOVERNMENT SERVES A SUBPOENA ON AN INDIVIDUAL OR A PARTY,  
11:06AM 3 AT SOME POINT WE ARE TRUSTING IN THE GOOD FAITH OF THE  
11:06AM 4 CUSTODIAN TO DO THEIR BEST, TO USE THEIR BEST EFFORTS TO  
11:06AM 5 CAPTURE EVERYTHING AND TURN IT OVER.

11:06AM 6 SO I THINK THAT THERE IS NO SHOWING THAT THAT PROCESS HAS  
11:06AM 7 FAILED IN THIS CASE, AND SO I THINK IT MIGHT BE PREMATURE TO  
11:06AM 8 ORDER ADDITIONAL STEPS.

11:06AM 9 IF ADDITIONAL STEPS ARE NECESSARY, THE GOVERNMENT IS HAPPY  
11:06AM 10 TO HELP HOWEVER IT CAN, BUT WHEN WE'RE TALKING ABOUT A RULE 16  
11:06AM 11 OBLIGATION, THE COURT MENTIONED THE GOVERNMENT PROVIDING  
11:06AM 12 GUIDANCE AND ASSISTANCE. GUIDANCE AND ASSISTANCE ARE NOT THE  
11:06AM 13 SAME THING AS ACCESS. IF WE HAD ACCESS TO THESE DOCUMENTS, WE  
11:06AM 14 CAN SIMPLY DECIDE HOW THEY'RE GOING TO BE COLLECTED, REVIEWED,  
11:06AM 15 AND PRODUCED. WE CAN'T MAKE THAT DECISION BECAUSE WE DON'T  
11:06AM 16 HAVE THAT ACCESS.

11:06AM 17 ONE OF MY GOALS THIS MORNING IS TO AVOID A SITUATION WHERE  
11:06AM 18 THE GOVERNMENT IS -- THE PHRASE "ON THE HOOK" HAS BEEN USED A  
11:06AM 19 COUPLE OF TIMES -- WHERE THE GOVERNMENT IS ON THE HOOK FOR THE  
11:06AM 20 SPECIFICS, THE REALLY KIND OF IN-THE-WEEDS SPECIFICS OF A  
11:06AM 21 PROCESS THAT IT DOESN'T CONTROL.

11:06AM 22 THE COURT: SURE. WHAT ARE YOU -- WHAT ARE YOUR  
11:07AM 23 THOUGHTS AS TO WHETHER OR NOT THIS COURT CAN ORDER ACCESS?

11:07AM 24 MR. BOSTIC: SO MY INITIAL THOUGHT ON THAT, YOUR  
11:07AM 25 HONOR, IS THAT WHEN WE'RE TALKING ABOUT THE SCOPE OF RULE 16,

11:07AM 1 THE QUESTION OF ACCESS DOESN'T TURN ON WHAT THE COURT ORDERS.

11:07AM 2 AS I READ THE CASE LAW, IT TURNS ON THE AUTHORITY THAT  
11:07AM 3 THE PROSECUTION HAS, OR LACKS, TO KNOW OF, ACCESS, AND CONTROL  
11:07AM 4 DOCUMENTS BASED ON ITS POSITION AS THE PROSECUTION.

11:07AM 5 I DON'T KNOW WHETHER THE COURT CAN EXPAND THAT ACCESS ON  
11:07AM 6 THE PROSECUTION'S BEHALF, BUT I'LL POINT OUT THAT THAT TAKES US  
11:07AM 7 IN A DIFFERENT DIRECTION FROM WHAT IS CONTEMPLATED IN THE  
11:07AM 8 CASES.

11:07AM 9 THE COURT: NO. RIGHT. I JUST ASK THAT QUESTION TO  
11:07AM 10 PERHAPS ENGAGE A GENERAL CONVERSATION ABOUT IT.

11:07AM 11 I KNOW YOUR HOOK, IF YOU WILL, MR. WADE, IS SANTIAGO AND  
11:07AM 12 WHAT THE COURT DID IN SANTIAGO, BUT OF COURSE THAT'S A LITTLE  
11:08AM 13 DIFFERENT BECAUSE IT WAS BUREAU OF PRISONS AND THERE WAS A  
11:08AM 14 LITTLE MORE PRIVACY BETWEEN THE PROSECUTION AND BUREAU OF  
11:08AM 15 PRISONS, AND ET CETERA. BUT I'M NOT GOING TO OPEN UP THAT  
11:08AM 16 DISCUSSION NOW.

11:08AM 17 MR. WADE: IF I MIGHT MAKE ONE SMALL POINT RELATED  
11:08AM 18 TO THAT, YOUR HONOR, BECAUSE IT IS DIFFERENT FROM JUST THE LAW.  
11:08AM 19 IT'S SPECIFIC TO THE FACTS OF THIS CASE.

11:08AM 20 THE GOVERNMENT DOES HAVE AN AGENT, AN FDA AGENT ON ITS  
11:08AM 21 PROSECUTION TEAM, AND HE'S A MEMBER OF THE PROSECUTION TEAM.  
11:08AM 22 THE DOCUMENTS THAT HAVE BEEN PRODUCED IN THIS CASE MAKE CLEAR  
11:08AM 23 THAT WHEN THAT AGENT WANTED TO, FOR EXAMPLE, INTERVIEW SOMEONE  
11:08AM 24 WITHIN THE FDA, THAT AGENT JUST DIRECTLY COMMUNICATED WITH THAT  
11:08AM 25 PERSON AND SAID I NEED THESE DOCUMENTS, CAN YOU SEND ME THESE



11:08AM 1 DOCUMENTS IN ADVANCE, AND THE AGENT GOT WHATEVER THEY ASKED  
11:08AM 2 FOR.

11:08AM 3 AND PART OF THE REASON THAT'S TRUE IS BECAUSE THERE'S  
11:08AM 4 STATUTORY AUTHORITY THAT GIVES THAT AGENT THE ABILITY TO GET  
11:08AM 5 THOSE DOCUMENTS WITHIN THE AGENCY. SO THEY ACTUALLY HAVE TO  
11:08AM 6 PROVIDE THE DOCUMENTS WITHIN THE AGENCY.

11:08AM 7 THE COURT: I UNDERSTAND. FOR THE RULE 16 ANALYSIS,  
11:09AM 8 I APPRECIATE THAT ASSISTANCE.

11:09AM 9 BUT WHAT I SEE PARAGRAPH 2, LET ME JUST SAY, WHAT I SEE  
11:09AM 10 PARAGRAPH 2 IS A VERY STRONG SUGGESTION TO THE AGENCIES FROM  
11:09AM 11 THE DEFENSE AS TO HOW THEY MIGHT CONDUCT SOME ADDITIONAL WORK  
11:09AM 12 TO ACCOMPLISH THE GOALS HERE.

11:09AM 13 I THINK THAT'S WHAT IT IS. MY SENSE IS THAT THE AGENCY  
11:09AM 14 LAWYERS LOOK AT THAT, READ IT AS SUCH, APPRECIATE YOUR  
11:09AM 15 SUGGESTIONS, AND WILL CONTINUE TO PROSECUTE THEIR DISCOVERY  
11:09AM 16 DILIGENTLY PURSUANT TO THE COURT'S ORDER THAT'S GOING TO BE  
11:09AM 17 FORTHCOMING.

11:09AM 18 MR. WADE: UNDERSTOOD, YOUR HONOR.

11:09AM 19 MS. DAW: YOUR HONOR, ON BEHALF OF THE FDA, IF THE  
11:09AM 20 COURT IS CONSIDERING AN ORDER PROVIDING ACCESS TO THEIR  
11:09AM 21 DOCUMENTS, I WOULD ASK THAT THE FDA BE GIVEN AN OPPORTUNITY TO  
11:09AM 22 BRIEF THAT ISSUE BECAUSE OF THE STATUTORY AND REGULATORY  
11:09AM 23 OBLIGATIONS THAT THEY HAVE TO PROTECT INFORMATION.

11:09AM 24 THE COURT: RIGHT.

11:09AM 25 MS. DAW: I DON'T WANT THEM TO BE IN THE POSITION OF

11:10AM 1 DUELING LEGAL OBLIGATIONS.

11:10AM 2 THE COURT: WELL, WHEN I SAY ACCESS, I REALIZE WITH  
11:10AM 3 ALL OF THE AUTHORITY THAT MY COLLEAGUES AND I HAVE AND ENJOY,  
11:10AM 4 I'M NOT SURE THAT WE CAN CREATE ACCESS JUST ON A SIGNATURE.  
11:10AM 5 MAYBE WE CAN CREATE IT. IT WON'T BE LONG LIVED, I WOULDN'T  
11:10AM 6 THINK, AND THAT'S NOT WHAT I WAS SUGGESTING TO DO.

11:10AM 7 BUT I DO THINK THAT IN CASES OF UNIQUE CIRCUMSTANCES LIKE  
11:10AM 8 THIS ONE, AND PARTICULARLY WHERE THE ACTIVITY OF THE PARTIES,  
11:10AM 9 AS MR. WADE POINTS OUT, MIGHT SUGGEST SOMETHING A LITTLE  
11:10AM 10 BROADER THAN PERHAPS -- CERTAINLY KNOWLEDGE IS ACCOMPLISHED AND  
11:10AM 11 MAYBE ACCESS IS REALLY THE ISSUE WE'RE TALKING ABOUT.

11:10AM 12 BUT I DO THINK GIVEN THE ROAD, THE PATH THAT I'VE LAID  
11:10AM 13 HERE TO ALLOW THE AGENCIES TO SELF-REGULATE, IF YOU WILL, TO  
11:10AM 14 DEVELOP THE INFORMATION AND PROVIDE IT KNOWING THAT WE WANT IT,  
11:10AM 15 THE COURT WANTS IT WITH THE ASSISTANCE, CONTINUED ASSISTANCE OF  
11:10AM 16 THE GOVERNMENT, IS PROVIDED A CONTINUING AVENUE TO INCREASE THE  
11:10AM 17 GOVERNMENT'S PARTICIPATION IN THAT ENDEAVOR.

11:11AM 18 MR. COOPERSMITH: YOUR HONOR, THANK YOU FOR THAT.  
11:11AM 19 JUST ONE WORD ABOUT ACCESS SINCE I HAVEN'T ADDRESSED THAT YET.

11:11AM 20 THE CONCEPT OF ACCESS, NOTWITHSTANDING WHAT THE GOVERNMENT  
11:11AM 21 HAS SAID IN COURT TODAY AND IN PREVIOUS HEARINGS, THE FACT IS  
11:11AM 22 THAT THEY, THE GOVERNMENT, ENJOYED ALL OF THE ACCESS THAT THEY  
11:11AM 23 WANTED, AND THE RECORD IS THAT THEY EVEN ENJOYED THAT ACCESS  
11:11AM 24 AFTER THE INDICTMENT IN JUNE 2018. WHEN THE ACCESS SUPPOSEDLY  
11:11AM 25 DRIED UP IS WHEN THE DEFENSE STARTED ASKING FOR DOCUMENTS.

11:11AM 1 SO ONCE THERE'S A FACTUAL -- AND IT IS A FACTUAL QUESTION  
11:11AM 2 IN THIS CASE, WAS THERE ACCESS? AND OUR ANSWER, OF COURSE, IS  
11:11AM 3 YES. THEN THE COURT CAN SIMPLY ORDER THE GOVERNMENT, AS IT  
11:11AM 4 SAID IT WAS INCLINED TO DO, TO PRODUCE, TO MAKE SURE THESE  
11:11AM 5 DOCUMENTS WERE PRODUCED UNDER RULE 16. THAT'S GOING TO BE  
11:11AM 6 IMMENSELY HELPFUL FOR ADDITIONAL REASONS THAT WE'LL DISCUSS  
11:11AM 7 WHEN WE GET TO THESE OTHER TOPICS, BUT THAT'S IT.

11:11AM 8 IN TERMS OF ADDITIONAL BRIEFING, I WOULD SUGGEST TO THE  
11:11AM 9 COURT THAT THESE AGENCIES AND THE GOVERNMENT HAVE HAD MANY,  
11:12AM 10 MANY OPPORTUNITIES TO BRIEF THIS. THIS ISSUE HAS BEEN ON THE  
11:12AM 11 TABLE. AND AT THIS POINT IF WE'RE GOING TO HOLD TO THE  
11:12AM 12 SCHEDULE, THESE DOCUMENTS HAVE TO BE PRODUCED, AND THE COURT  
11:12AM 13 HAS SUGGESTED THAT AT THE END OF THE YEAR WOULD BE A GOOD  
11:12AM 14 DEADLINE.

11:12AM 15 SO I THINK THE ACCESS IS CLEAR, AND I THINK THE GOVERNMENT  
11:12AM 16 SHOULD HAVE THE OBLIGATION. AT THAT POINT, YOU KNOW, THE  
11:12AM 17 GOVERNMENT IS GOING TO BE IMMENSELY HELPFUL.

11:12AM 18 FOR EXAMPLE, ON PARAGRAPH 2 THEY WERE JUST TALKING ABOUT  
11:12AM 19 MANUAL REVIEW BY CUSTODIANS OR MANUAL COLLECTION. ULTIMATELY  
11:12AM 20 THE GOVERNMENT CAN SIMPLY OVERSEE THIS. IT DOESN'T MEAN THEY  
11:12AM 21 HAVE TO GET INTO THE TRENCHES AND START LOOKING IN THE FILE  
11:12AM 22 ROOM, BUT THEY CAN OVERSEE THIS AND ASK THE RIGHT QUESTIONS TO  
11:12AM 23 MAKE SURE THAT IF THERE WAS A COLLECTION FROM CUSTODIANS, HOW  
11:12AM 24 THAT OCCURRED, MAKE SURE IT WAS ADEQUATE.

11:12AM 25 IT IS REALLY THE SAME THING I WOULD DO WHEN I GET A

11:12AM 1 SUBPOENA FROM THE GOVERNMENT. I DON'T TELL THE CLIENT, WELL,  
11:12AM 2 HERE'S A SUBPOENA, LET ME KNOW WHEN YOU'RE DONE COLLECTING. I  
11:12AM 3 HAVE TO GET IN THERE AND ASK THE RIGHT QUESTIONS, MAKE SURE  
11:13AM 4 THAT THEY HAVE THOUGHT OF EVERYTHING, MAKE SURE THAT THEY HAVE  
11:13AM 5 THOUGHT OF HARD COPY, MAKE SURE THEY HAVE THOUGHT OF TEXTS,  
11:13AM 6 MAKE SURE THEY THOUGHT ALL OF THE RANGE OF THINGS THAT YOU HAVE  
11:13AM 7 TO DO. THAT'S WHAT THE GOVERNMENT EXPECTS OF ME WHEN I GET A  
11:13AM 8 SUBPOENA, AND WE'RE EXPECTING NO LESS FROM THE GOVERNMENT.

11:13AM 9 MR. BOSTIC: YOUR HONOR, THAT'S A KEY POINT THAT  
11:13AM 10 MR. COPPERSMITH JUST MADE. WHEN HIS CLIENT GETS A SUBPOENA HE,  
11:13AM 11 AS HIS CLIENT'S LAWYER, IS RESPONSIBLE FOR ENSURING THEIR  
11:13AM 12 COMPLIANCE WITH THAT SUBPOENA. THAT'S WHAT THEY PAY HIM TO DO.  
11:13AM 13 THEY GIVE HIM THAT AUTHORITY TO COME IN AND GUIDE THEIR  
11:13AM 14 COLLECTION EFFORTS. THAT'S THE SOURCE OF HIS OBLIGATION AND  
11:13AM 15 THAT IS THE SOURCE OF HIS AUTHORITY.

11:13AM 16 NONE OF THAT APPLIES WITH RESPECT TO THE PROSECUTION AND  
11:13AM 17 THESE AGENCIES. WE DO NOT HAVE THE AUTHORITY OR THE ABILITY TO  
11:13AM 18 DICTATE THE TERMS OF HOW THEY COLLECT AND PRODUCE THESE  
11:13AM 19 DOCUMENTS, AND THAT'S THE CORE REASON WHY WE'RE RESISTANT TO  
11:13AM 20 THE IDEA OF A RULE 16 ORDER.

11:13AM 21 THE COURT: I UNDERSTAND. IT WAS REALLY PROVIDENT  
11:13AM 22 OF ME TO RAISE THAT ISSUE, WASN'T IT?

11:14AM 23 ALL RIGHT. LET'S MOVE TO NUMBER 3, SHALL WE?

11:14AM 24 MR. WADE: YES, YOUR HONOR, BACK TO DOCUMENT 170,  
11:14AM 25 PAGE 10, ITEM 3. I BELIEVE THAT'S A TIMING ISSUE WHICH I

1 BELIEVE THE COURT IS PREPARED TO ADDRESS. I WON'T BELABOR  
2 THAT.

3 STARTING ON ITEM 4 ARE A HOST OF TECHNICAL ISSUES. THERE  
4 ARE SOME SUBPARAGRAPHS HERE. THIS IS SORT OF THE NITTY GRITTY  
5 OF IT, YOUR HONOR.

6 AND AS INFORMED BY EXHIBIT A, WHICH IS THE LETTER WHICH  
7 DISCUSSES THESE TECHNICAL DEFICIENCIES WHICH IS SLIGHTLY  
8 IMPENETRABLE TO THE DEFENSE AT TIMES SPECIFICALLY AS IT RELATES  
9 TO SOME OF THE REDACTIONS AND DOCUMENTS THAT ARE WITHHELD.

10 BUT IF WE CAN START WITH THE SEARCH TERMS, WHICH IS WHAT  
11 IS IN PARAGRAPH 4, THERE ARE A COUPLE OF SPECIFIC DEFICIENCIES  
12 THAT ARE IDENTIFIED THERE, THE FIRST OF WHICH IS THAT THERE WAS  
13 NOT A STAND-ALONE SEARCH TERM FOR THE ROLLING CUSTODIANS FOR  
14 THE TERM THERANOS WHICH WAS SOMEWHAT -- MAYBE IT'S OVERLY  
15 SIMPLISTIC, BUT IT'S SOMEWHAT MYSTIFYING TO THE DEFENSE THAT  
16 THAT SIMPLE TERM WASN'T INCLUDED TO IDENTIFY THE POOL OF  
17 DOCUMENTS THAT SHOULD BE REVIEWED TO MAKE SURE THAT MATERIAL IS  
18 GATHERED.

19 THE SECOND ISSUE RELATES TO LABORATORY DEVELOPED TESTS, OR  
20 LDT, AND USING THAT AS SEARCH TERMS WHICH GIVEN SOME OF THE  
21 BACK AND FORTH WITH THE AGENCIES AND THE QUESTION AS TO WHETHER  
22 THE FDA EVEN HAD THE AUTHORITY TO REGULATE THERANOS, IT ALL  
23 CENTERS ON THAT TERM. THAT IS CLEARLY WHAT PART OF THE REQUEST  
24 THAT IS SET FORTH IN CATEGORY 4 OF THE DEFENSE REQUEST AND HOW  
25 THAT, HOW THAT REQUEST THAT A SEARCH FOR DOCUMENTS RESPONSIVE

11:16AM 1 TO THAT REQUEST COULD BE DONE WITHOUT AT LEAST LOOKING AT  
11:16AM 2 DOCUMENTS THAT HAVE LAB DEVELOPED TESTS, OR LDT'S, WE FAIL TO  
11:16AM 3 UNDERSTAND.

11:16AM 4 MR. COOPERSMITH: YOUR HONOR, IF I COULD ADD  
11:16AM 5 SOMETHING TO THIS ISSUE OF THE SEARCH TERMS. LDT, LABORATORY  
11:16AM 6 DEVELOPED TESTS, IS ONE EXAMPLE, BUT THERE ARE OTHERS. JUST TO  
11:16AM 7 PUT A FINE POINT ON THIS AND TO START FROM THE CONCEPT. SO A  
11:16AM 8 LABORATORY DEVELOPED TEST IS BASICALLY A TEST THAT A LABORATORY  
11:16AM 9 COMES UP WITH ON ITS OWN AND RUNS IN ITS OWN LAB.

11:16AM 10 TRADITIONALLY, THE FDA HAS BACKED OFF ON ENFORCING THEIR  
11:16AM 11 MEDICAL DEVICE REGULATIONS ON THAT SORT OF THING. INSTEAD,  
11:16AM 12 THEY HAVE LEFT THAT REGULATION TO CMS AS THE REGULATOR OF  
11:16AM 13 LABORATORIES IN THE UNITED STATES.

11:16AM 14 SO IF YOU DEVELOP YOUR OWN TEST, AND YOU DON'T TRY TO SELL  
11:16AM 15 IT TO SOMEONE ELSE COMMERCIALY BUT YOU'RE RUNNING IT IN YOUR  
11:17AM 16 OWN LAB, THAT CONCEPT OF AN LDT IS WHAT THE FDA HAS  
11:17AM 17 TRADITIONALLY DECIDED THAT WE'LL LEAVE THAT TO CMS TO MAKE SURE  
11:17AM 18 THE TESTS ARE BEING RUN CORRECTLY, BUT WE'RE NOT GOING TO  
11:17AM 19 REGULATE IT AS A MEDICAL DEVICE. THAT'S THE ISSUE.

11:17AM 20 THAT'S AN IMPORTANT REALLY CENTRAL ISSUE IN THIS CASE  
11:17AM 21 BECAUSE, AS MR. WADE SAID, IT GOES TO THE HEART OF WHETHER THE  
11:17AM 22 FDA REALLY HAD ANY AUTHORITY TO REGULATE THE THERANOS DEVICES  
11:17AM 23 AND TESTS THAT ARE MENTIONED IN THE INDICTMENT AND ARE STRONGLY  
11:17AM 24 AT ISSUE IN THIS CASE.

11:17AM 25 SO WHEN YOU LOOK AT THAT SEARCH TERM -- NOW, THE

1 GOVERNMENT'S ARGUMENT ON THIS SEARCH TERM, AND MS. DAW MAKES  
2 IT, AND THE AGENCY COUNSEL MAKE IT, AND MR. BOSTIC MADE IT IN  
3 THE STATUS REPORT, IS THAT THEY SAY, OH, IF YOU LOOK AT  
4 CATEGORY 4 OF THE COURT'S JULY 19TH ORDER, IT DOESN'T MENTION  
5 THE TERM LDT. THAT'S THE CATEGORY THAT YOU MAY HAVE IT IN  
6 FRONT OF YOUR HONOR THAT ASKS FOR ALL DOCUMENTS REGARDING THE  
7 FDA'S TERMINATION OF THE TYPE OF FDA APPROVAL REQUIRED FOR  
8 THERANOS'S PROPRIETARY TECHNOLOGY.

9 SO WE'RE TALKING ABOUT DOES THE FDA HAVE TO APPROVE THE  
10 THERANOS DEVICES AS A MEDICAL DEVICE OR IS IT GOING TO BE UNDER  
11 THIS LDT CATEGORY?

12 SO WHEN YOU LOOK AT THE ACTUAL SEARCH TERMS THE FDA USED  
13 TO DO THE SEARCHES, THEY RAN THERANOS, THE TERM THERANOS, AND  
14 VARIOUS THINGS, INCLUDING THE TERM HUMANITARIAN DEVICE  
15 EXEMPTION.

16 WELL, THE TERM HUMANITARIAN DEVICE EXEMPTION DOESN'T  
17 APPEAR IN THE COURT'S ORDER CATEGORY 4, EITHER.

18 BUT TO EXCLUDE LDT'S -- TO RUN THE SEARCH FOR HUMANITARIAN  
19 DEVICE EXEMPTION, WHICH DOESN'T APPEAR IN THE COURT'S ORDER,  
20 THEN TO ARGUE WE DON'T HAVE TO SEARCH FOR THERANOS AND LDT'S  
21 BECAUSE THAT'S NOT IN THE COURT ORDER, THAT MAKES NO SENSE.

22 AND WHAT WE THINK HAS GONE ON HERE, YOUR HONOR, IS BY  
23 EXCLUDING THE TERM LDT THE AGENCIES HAVE EXCLUDED A LARGE  
24 UNIVERSE OF DOCUMENTS THAT RESPOND TO THE COURT ORDER AND ARE  
25 AT THE CORE OF THIS CASE.

11:18AM 1 YOUR HONOR, THAT'S PROBABLY THE REASON WHY WHEN WE LOOK AT  
11:19AM 2 THE HISTOGRAM WE'VE ATTACHED TO THE STATUS REPORT, AND YOU'VE  
11:19AM 3 SEEN IT BEFORE, YOUR HONOR, IT JUST MAPS OUT WHAT TIME PERIODS  
11:19AM 4 THESE DOCUMENTS CORRESPOND TO, THERE'S A VERY LOW INCIDENCE OF  
11:19AM 5 DOCUMENTS IN 2014. WE KNOW THAT 2014 WAS A HEAVY YEAR WHERE  
11:19AM 6 THE DISCUSSION, THE DIALOGUE BETWEEN THERANOS AND FDA ABOUT  
11:19AM 7 LDT'S WAS ONGOING.

11:19AM 8 SO TO EXCLUDE THAT SEARCH TERM MAKES NO SENSE.

11:19AM 9 THE COURT: SO, LET ME JUST --

11:19AM 10 MR. COOPERSMITH: PLEASE, YOUR HONOR.

11:19AM 11 THE COURT: IT'S THREE AND TWO NOW. LET'S GET TO  
11:19AM 12 THE PITCH.

11:19AM 13 MR. COOPERSMITH: YES, YOUR HONOR.

11:19AM 14 THE COURT: WHAT IS IT YOU WANT?

11:19AM 15 MR. COOPERSMITH: WELL, THE PITCH IS THAT I THINK  
11:19AM 16 THEY NEED TO GO BACK. REMEMBER, THEY NEVER ASKED US WHAT  
11:19AM 17 SEARCH TERMS THEY WERE RUNNING, BUT THERE WERE A NUMBER OF  
11:19AM 18 SEARCH TERMS, LDT BEING ONE EXAMPLE, AND WE NEED TO GO BACK AND  
11:19AM 19 TELL THEM WHAT SEARCH TERMS NEED TO BE ADDED HERE, AND THEY  
11:19AM 20 NEED TO RUN THOSE SEARCH TERMS.

11:19AM 21 THE COURT: AND THAT'S -- YOU WANT A FASTBALL RIGHT  
11:20AM 22 DOWN THE MIDDLE?

11:20AM 23 MR. COOPERSMITH: RIGHT DOWN THE MIDDLE.

11:20AM 24 THE COURT: AND SO IT'S LDT TERMS YOU WANT THEM TO  
11:20AM 25 RUN?



11:20AM 1 MR. COOPERSMITH: WELL, WE CAN GIVE A WHOLE LIST OF  
11:20AM 2 SEARCH TERMS, YOUR HONOR. THAT'S ONE. WE CAN DO IT NOW OR WE  
11:20AM 3 CAN DO IT --

11:20AM 4 THE COURT: SO TELL ME ABOUT THAT. WHEN YOU SAY "I  
11:20AM 5 HAVE GIVE A WHOLE LIST," YOU CAN IMAGINE THE EXCITEMENT THAT  
11:20AM 6 THE PROSECUTION AND THE AGENCY HAS WITH THAT. IS THAT A LIST  
11:20AM 7 OF 50 NAMES NOW? IS THAT A LIST OF THREE THINGS?

11:20AM 8 IT SEEMS LIKE -- I THINK I TAKE YOUR POINT, AND IT SEEMS  
11:20AM 9 LIKE THERANOS AND LDT, THAT'S SOMETHING THAT PROBABLY HAS SOME  
11:20AM 10 RELEVANCE AND WOULD PRODUCE SOME DOCUMENTS THAT MIGHT BE  
11:20AM 11 RELEVANT TO CATEGORY 2 EVEN, CATEGORY 4 PERHAPS.

11:20AM 12 BUT I'M JUST CURIOUS, IF WE WANT TO PROCEED HERE, WHAT IS  
11:20AM 13 IT THAT YOU SUGGEST BE ALTERED, CHANGED OR USED AS ALTERNATIVE  
11:20AM 14 TERMS TO ACCOMPLISH THIS?

11:20AM 15 I'M CURIOUS THEN WHAT THE PRODUCTION WOULD LOOK LIKE?  
11:20AM 16 WHAT IS THE SIZE OF THAT ALWAYS BEING MINDFUL OF HOW MUCH TIME  
11:21AM 17 THIS IS GOING TO TAKE?

11:21AM 18 MR. COOPERSMITH: WELL, YOUR HONOR, SO FIRST OF ALL,  
11:21AM 19 WE'RE NOT ASKING THEM TO REDO. I MEAN, THEY'VE PRODUCED THE  
11:21AM 20 DOCUMENTS THAT THEY HAVE ALREADY PRODUCED.

11:21AM 21 BUT I JUST WANT TO POINT OUT THAT IF THE AGENCIES HAD NOT  
11:21AM 22 KEPT US IN THE DARK AND HAD TOLD US WHAT THEY WERE DOING, WE  
11:21AM 23 WOULD HAVE BEEN ABLE TO TELL THEM.

11:21AM 24 SO, YOU KNOW, I DON'T WANT TO BELABOR THAT POINT, BUT I  
11:21AM 25 THINK THAT'S THE CASE.

11:21AM 1 THE COURT: THAT'S A GOOD CHOICE.

11:21AM 2 MR. COOPERSMITH: YES, YOUR HONOR. BUT GOING  
11:21AM 3 FORWARD, MOVING FORWARD WE HAVE LDT, AS I'VE JUST EXPLAINED.

11:21AM 4 THE COURT: RIGHT.

11:21AM 5 MR. COOPERSMITH: THERE'S ANOTHER TERM THAT IS  
11:21AM 6 UNIQUE TO THERANOS'S BUSINESS, AND IT'S THE TERM NANOTAINER.

11:21AM 7 THE COURT: SPELL THAT.

11:21AM 8 MR. COOPERSMITH: N-A-N-O-T-A-I-N-E-R, NANOTAINER.  
11:21AM 9 THAT'S A TERM THAT IS UNIQUE TO THERANOS. SO I'M NOT AWARE OF  
11:21AM 10 OTHER COMPANIES WHO USE THAT TERM. THAT'S WHAT THERANOS CALLED  
11:21AM 11 ITS BLOOD COLLECTION DEVICE THAT COLLECTED SMALL BLOOD SAMPLES.

11:22AM 12 WHEN YOU LOOK AT THE SEARCH TERMS THAT THE FDA HAS RUN,  
11:22AM 13 THEY HAVE NOT RUN THAT TERM EITHER, AND THAT'S LIKELY TO  
11:22AM 14 PRODUCE ADDITIONAL DOCUMENTS.

11:22AM 15 SO WE DON'T WANT TO REDO ANYTHING, YOUR HONOR, BUT MOVING  
11:22AM 16 FORWARD WE WOULD LIKE THESE ADDITIONAL SEARCH TERMS RUN. AND  
11:22AM 17 WE CAN TRY TO BE AS LIMITED, YOU KNOW, SO THEY'RE THE ONES THAT  
11:22AM 18 ARE REALLY IMPORTANT, AND THEN TO HAVE THEM RUN IT, AND MAKE  
11:22AM 19 SURE THOSE DOCUMENTS ARE PROPERLY REVIEWED, AND PRODUCED IF  
11:22AM 20 THEY RESPOND TO THE COURT'S ORDER.

11:22AM 21 THE COURT: THANK YOU. SO, MR. COOPERSMITH, IS THIS  
11:22AM 22 SOMETHING THAT YOU WOULD LIKE THE COURT TO ORDER -- I KNOW YOU  
11:22AM 23 WANT THE COURT TO ORDER IT, BUT THE TIMING OF THAT? IS THAT  
11:22AM 24 SOMETHING THAT WE SHOULD DISCUSS NOW? IS THIS SOMETHING THAT I  
11:22AM 25 SHOULD GIVE YOU THE PRIVILEGE OF MEETING AND CONFERRING WITH

11:22AM 1 AGENCY COUNSEL AND THE GOVERNMENT TO DEVELOP A STRATEGY TO  
11:22AM 2 ACCOMPLISH THAT WITHIN THE TIMELINE THAT THE COURT IS GOING TO  
11:22AM 3 GIVE?

11:22AM 4 MR. COOPERSMITH: YES, YOUR HONOR. SO THE ISSUE IS  
11:22AM 5 REALLY ONE OF TIMING, RIGHT? THE LONGER THAT WE GO WITH MEET  
11:22AM 6 AND CONFER AS OPPOSED TO A COURT ORDER DIRECTING THESE  
11:23AM 7 ADDITIONAL SEARCH TERMS, THE MORE IT'S GOING TO BE PROBLEMATIC,  
11:23AM 8 RIGHT? BECAUSE IN THE MEET AND CONFER WE MAY GET, YOU KNOW,  
11:23AM 9 DISAGREEMENTS ON THESE THINGS.

11:23AM 10 WHAT I THINK MAKES MORE SENSE TO ME IS THAT THE COURT  
11:23AM 11 ORDER THE LDT, AND LABORATORY DEVELOPED TEST TERMS, THE  
11:23AM 12 NANOTAINER TERMS, FINGERSTICK IS ANOTHER ONE. THAT WAS A  
11:23AM 13 COMMON TERM USED IN THE CASE OF THERANOS FOR THE WAY THAT THEY  
11:23AM 14 COLLECTED BLOOD.

11:23AM 15 AT LEAST IF THOSE WERE RUN, AND I HAVE A LIST OF, YOU  
11:23AM 16 KNOW, 23 THINGS, BUT WITHOUT READING THAT, YOU KNOW, THOSE 3  
11:23AM 17 STAND OUT TO ME AS THE MOST IMPORTANT.

11:23AM 18 YOU KNOW, A COURT ORDER -- THAT WOULD SAVE TIME, YOUR  
11:23AM 19 HONOR. BASICALLY THEY WOULD HAVE TO RUN THOSE. WHATEVER  
11:23AM 20 DOCUMENTS COME UP IN THOSE SEARCHES THEY WOULD HAVE TO REVIEW,  
11:23AM 21 AND I THINK WE WOULD BE CLOSER TO GETTING COMPLIANCE WITH THE  
11:23AM 22 ORDER.

11:23AM 23 THE COURT: SURE. WELL, AS I TOLD YOU, WORKING  
11:23AM 24 BACKWARDS, BECAUSE I TOLD YOU THE END OF THE YEAR IS THE  
11:23AM 25 TIMELINE THAT I'M GOING TO SET HERE. SO YOUR MEET AND CONFERS,

11:23AM 1 YOU SET THOSE UP SUCH THAT YOU CAN ACCOMPLISH THIS BY THE END  
11:23AM 2 OF THE YEAR. WORKING BACKWARDS, THAT'S HOW THAT WOULD WORK.

11:24AM 3 MR. WADE: WE'RE PREPARED TO DO IT AS SOON AS AFTER  
11:24AM 4 THIS CONFERENCE.

11:24AM 5 THE COURT: SURE.

11:24AM 6 MR. WADE: I THINK THE TERM THERANOS IS A  
11:24AM 7 STAND-ALONE TERM. LDT AND A COUPLE OF THE TERMS THAT  
11:24AM 8 MR. COPPERSMITH HAS SUGGESTED, MAYBE A COUPLE MORE, WE'RE NOT  
11:24AM 9 LOOKING TO REINVENT THE WHEEL HERE, BUT THERE ARE JUST A COUPLE  
11:24AM 10 OF VERY OBVIOUS TERMS THAT WE THINK WERE OMITTED, AND WE WOULD  
11:24AM 11 ASK THAT THOSE BE INCLUDED.

11:24AM 12 THE COURT: OKAY. LET ME ASK MS. MARTINEZ-RESLY  
11:24AM 13 ABOUT THIS.

11:24AM 14 MS. MARTINEZ-RESLY: YES, YES, YOUR HONOR.

11:24AM 15 SO THE, SO THE SEARCH TERMS THAT WE UTILIZED WERE -- WE  
11:24AM 16 PROVIDED TO THE PARTIES AND WERE SPECIFICALLY GEARED TOWARD THE  
11:24AM 17 SIX CATEGORIES REQUESTED BY THE DEFENDANTS IN THEIR MOTION TO  
11:24AM 18 COMPEL.

11:24AM 19 WHAT I'M HEARING SUGGESTED NOW AND AT THE MEET AND CONFER  
11:24AM 20 IS THAT NOW THAT THEY ARE SEEKING DOCUMENTS FAR BROADER THAN  
11:25AM 21 THE SIX CATEGORIES OF DOCUMENTS JUST AS INDICATED BY THE  
11:25AM 22 STANDALONE TERM "THERANOS," FOR EXAMPLE, WE HAVE LAID OUT IN  
11:25AM 23 OUR OCTOBER 30TH LETTER TO THE COURT AS TO SPECIFICALLY WHY WE  
11:25AM 24 DO NOT BELIEVE AN LDT IS AN APPROPRIATE SEARCH TERM FOR THE SIX  
11:25AM 25 CATEGORIES OF DOCUMENTS.

11:25AM 1 BUT I DID JUST WANT TO POINT THAT OUT THAT THE SEARCH  
11:25AM 2 TERMS THAT THE DEFENDANTS ARE REQUESTING HERE SEEM TO BE FAR  
11:25AM 3 BROADER THAN WHAT THEY ORIGINALLY REQUESTED AND WHAT THE COURT  
11:25AM 4 ORDERED THE AGENCIES TO SEARCH FOR AND PRODUCE.

11:25AM 5 THE COURT: OKAY. THANK YOU, MS. MARTINEZ-RESLY.

11:25AM 6 LET ME ASK YOU, IF -- WHAT WOULD IT ENTAIL TO INSERT THESE  
11:25AM 7 NEW SEARCH TERMS, THESE THREE SEARCH TERMS, THE LDT, THE  
11:25AM 8 NANOTAINER, FINGERSTICK?

11:26AM 9 MS. MARTINEZ-RESLY: SO THAT -- I'M SORRY. GO  
11:26AM 10 AHEAD. DID I INTERRUPT YOU, YOUR HONOR?

11:26AM 11 THE COURT: I WAS GOING TO SAY THERANOS ALSO. SO  
11:26AM 12 THERE WAS FOUR OF THEM.

11:26AM 13 MS. MARTINEZ-RESLY: SURE. SO I GUESS I WOULD SAY  
11:26AM 14 THAT OUR INITIAL COLLECTION, TO THE EXTENT IT WAS DONE VIA THE  
11:26AM 15 SEARCH TERMS -- I'M SORRY.

11:26AM 16 OUR INITIAL COLLECTION DID INCLUDE THERANOS AS A  
11:26AM 17 STANDALONE SEARCH TERM ANYWAY AND NANOTAINER AS WELL I'M BEING  
11:26AM 18 REMINDED. AND SO THE DOCUMENTS FROM WHICH WE, YOU KNOW, KIND  
11:26AM 19 OF A STARTING SUBSET OF DOCUMENTS DID REQUEST THOSE TWO SEARCH  
11:26AM 20 TERMS.

11:26AM 21 AND TO YOUR SECOND QUESTION WHICH WAS HOW -- WHAT WOULD IT  
11:26AM 22 TAKE AND WHAT WOULD BE THE RESULT OF YOU USING THESE ADDITIONAL  
11:26AM 23 SEARCH TERMS? WE CAN PUT THOSE SEARCH TERMS THROUGH OUR  
11:26AM 24 DOCUMENT REVIEW DATABASE, AND THE AMOUNT OF TIME IT WOULD TAKE  
11:27AM 25 WOULD DEPEND, OF COURSE, ON THE VOLUME OF MATERIAL RESPONSIVE

11:27AM 1 TO THOSE TERMS.

11:27AM 2 IT'S DIFFICULT FOR ME TO ESTIMATE AT THIS POINT WITHOUT  
11:27AM 3 KNOWING THE VOLUME, BUT I DO THINK THAT IF THE COURT WERE TO  
11:27AM 4 ORDER THE PRODUCTION BY THE END OF THE YEAR, WE WOULD DO OUR  
11:27AM 5 ABSOLUTE BEST AS WE HAVE BEEN DOING TO MAKE THAT DEADLINE.

11:27AM 6 THE COURT: OKAY.

11:27AM 7 MS. NORTON: YOUR HONOR, THIS IS MARCI NORTON.

11:27AM 8 I WOULD JUST LIKE TO ADD THAT THERE'S ANOTHER QUESTION  
11:27AM 9 HERE, WHICH IS IF WE HAD TO GO BACK TO OUR ORIGINAL SEARCH OF  
11:27AM 10 THE OVER 80 CUSTODIANS THAT HAVE BEEN SEARCHED SO FAR AND ADD  
11:27AM 11 NEW SEARCH TERMS LIKE FINGERSTICK OR LTD, THAT WOULD TAKE QUITE  
11:27AM 12 SOME TIME BECAUSE FOR THE FORMER EMPLOYEES THOSE SEARCHES ARE  
11:27AM 13 OUT OF OUR HANDS. THOSE ARE DONE BY OUR OFFICE OF INFORMATION  
11:27AM 14 MANAGEMENT STAFF, AND I THINK WE WERE RECENTLY TOLD THAT IT'S  
11:28AM 15 AT LEAST SIX WEEKS TO DO A SEARCH OF A FORMER EMPLOYEE'S FILES.

11:28AM 16 SO WHAT MS. MARTINEZ-RESLY WAS TALKING ABOUT IS IF WE ADD  
11:28AM 17 THOSE SEARCH TERMS TO THE CURRENTLY COLLECTED DOCUMENTS, WHICH  
11:28AM 18 I BELIEVE IS HUNDREDS OF THOUSANDS OF PAGES, THAT COULD BE DONE  
11:28AM 19 WITH THE SOFTWARE THAT WE HAVE NOW.

11:28AM 20 IF WE'RE TALKING ABOUT RESEARCHING, ESPECIALLY WITH  
11:28AM 21 RESPECT TO THOSE FORMER EMPLOYEES, I DON'T KNOW THAT WE WOULD  
11:28AM 22 BE ABLE TO MEET AN END-OF-THE-YEAR DEADLINE.

11:28AM 23 THE COURT: OKAY. THANK YOU. MR. COPPERSMITH.

11:28AM 24 MR. COOPERSMITH: YOUR HONOR, JUST TO BRIEFLY POINT  
11:28AM 25 OUT IN RESPONSE TO ONE THING THAT WAS SAID, THIS IS IN NO WAY

11:28AM 1 AN EFFORT TO EXPAND THE COURT ORDER.

11:28AM 2 THE COURT ORDER, AND I'M TALKING ABOUT CATEGORY 4 IN THE  
11:28AM 3 COURT'S ORDER, DIRECTLY REQUIRES PRODUCTION OF INFORMATION,  
11:28AM 4 DOCUMENTS REGARDING THE FDA'S DETERMINATION OF THE TYPE OF FDA  
11:29AM 5 APPROVAL FOR THERANOS'S PROPRIETARY TESTING.

11:29AM 6 THERE CAN BE NO SEARCH TERM THAT IS MORE THE CORE OF THAT  
11:29AM 7 CATEGORY THAN THIS LDT SEARCH TERM. REALLY THE SAME GOES FOR  
11:29AM 8 NANOTAINER AND FINGERSTICK.

11:29AM 9 AND FOR THE GOVERNMENT TO SAY THAT'S NOT THE CASE WHEN  
11:29AM 10 THEY'VE DECIDED TO RUN SEARCH TERMS LIKE HUMANITARIAN DEVICE,  
11:29AM 11 WHICH ALSO DON'T APPEAR IN THE COURT'S ORDER, THEY'RE SORT OF  
11:29AM 12 TRYING TO FIND THINGS ON THE FRINGES, AND IT'S HARD TO  
11:29AM 13 UNDERSTAND HOW THEY WERE REALLY TRYING TO COLLECT ALL OF THE  
11:29AM 14 DOCUMENTS THAT WERE AT THE VERY HEART OF THIS CASE IF THEY  
11:29AM 15 DIDN'T RUN LTD.

11:29AM 16 THE COURT: AND YOU DIDN'T HAVE AN OPPORTUNITY,  
11:29AM 17 MR. COPPERSMITH, TO GIVE SUGGESTED SEARCH TERMS?

11:29AM 18 MR. COOPERSMITH: NO. THEY KEPT US IN THE DARK, AND  
11:29AM 19 EVENTUALLY THEY DID PROVIDE US LATE IN THE GAME WITH HERE'S  
11:29AM 20 WHAT WE RAN WHICH IS WHY WE'RE BEFORE THE COURT TALKING ABOUT  
11:29AM 21 THIS.

11:29AM 22 THE COURT: OKAY.

11:29AM 23 MR. COOPERSMITH: BUT THEY DIDN'T EVER CONSULT WITH  
11:29AM 24 US AND SAY, HEY, ARE THERE SEARCH TERMS THAT YOU WOULD LIKE US  
11:29AM 25 TO RUN? AND MAYBE THEY WOULDN'T HAVE AGREED WITH US ON

11:29AM 1 EVERYTHING, BUT THEY DIDN'T DO THAT.

11:30AM 2 THE COURT: SO YOU HEARD THE EXPLANATION THAT IT  
11:30AM 3 WILL BE PERHAPS SIX WEEKS TO CONTACT THE OIM OF THE AGENCY FOR  
11:30AM 4 FORMER EMPLOYEES.

11:30AM 5 AND YOU HEARD ABOUT, AS I UNDERSTAND IT, IF THE AGENCY  
11:30AM 6 GOES FORWARD NOW WITH THESE NEW SEARCH TERMS ON -- IT SOUNDS  
11:30AM 7 LIKE IT'S 80 EMPLOYEES, I THINK SHE SAID -- IT MIGHT TAKE SOME  
11:30AM 8 TIME.

11:30AM 9 ARE YOU ASKING -- IS THAT WHAT YOU WANT TO HAVE DONE?

11:30AM 10 MR. COOPERSMITH: I THINK IT'S REQUIRED UNDER THE  
11:30AM 11 COURT ORDER, YOUR HONOR, AND I'M SORRY IT HASN'T HAPPENED  
11:30AM 12 ALREADY.

11:30AM 13 THE COURT: THAT'S WHAT YOU WANT DONE?

11:30AM 14 MR. COOPERSMITH: YES, YOUR HONOR.

11:30AM 15 MR. WADE: IT NEEDS TO BE DONE.

11:30AM 16 MS. NORTON: YOUR HONOR, THIS IS MARCI NORTON. MAY  
11:30AM 17 I JUST INTERJECT A COUPLE OF THINGS?

11:30AM 18 THE COURT: YES.

11:30AM 19 MS. NORTON: THANK YOU. FIRST OF ALL, I HAVE TO  
11:30AM 20 CORRECT MR. COPPERSMITH'S COMMENTS THAT THE FDA NEVER REACHED  
11:30AM 21 OUT TO HIM REGARDING SEARCH TERMS.

11:30AM 22 WHILE IT MAY BE THE CASE THAT WE DID NOT, WITH RESPECT TO  
11:30AM 23 THE MOTION TO COMPEL, I PERSONALLY E-MAILED MR. COPPERSMITH'S  
11:31AM 24 ASSOCIATE IN FEBRUARY, I BELIEVE, OF THIS YEAR AFTER THE  
11:31AM 25 GOVERNMENT SHUTDOWN WAS OVER AND WE WERE TALKING ABOUT THE



1 SUBPOENA TO REQUEST SEARCH TERMS, AND I WAS NEVER PROVIDED ANY.  
2 SO I WANTED TO MAKE THAT CLEAR ON THE RECORD.

3 SECONDLY, I'D LIKE TO POINT OUT, BECAUSE THEY SEEM TO --  
4 MR. COPPERSMITH SEEMS TO BE HUNG UP ON THE FACT THAT THE FDA  
5 LOOKS FOR THE TERMS HUMANITARIAN DEVICE EXEMPTION.

6 AS HE'S AWARE, AND YOU MAY NOT BE AWARE, THERE ARE MANY  
7 WAYS THAT A MEDICAL DEVICE CAN COME TO MARKET LEGALLY THROUGH  
8 FDA. SO OUR SEARCH TERMS THAT WE USE, BECAUSE IT HAS ALWAYS  
9 BEEN FDA'S POSITION THAT THERANOS'S DEVICES ARE NOT LABORATORY  
10 DEVELOPED TESTS, WE USED THE SEARCH TERM FOR THE TYPE OF  
11 APPROVAL AND CLEARANCES THAT ONE MIGHT GET THROUGH FDA, AND  
12 THOSE ARE WHAT ARE CALLED THE 510K PROCESS; THERE'S A PMA, THE  
13 PREMARKET APPROVAL PROCESS; THE 510K CALLED CLEARANCE; THERE'S  
14 A HUMANITARIAN DEVICE EXEMPTION, WHICH WE KNEW THEY DID NOT  
15 HAVE BUT WE SEARCHED, JUST TO BE CLEAR; AND THEN INVESTIGATION  
16 DEVICE EXEMPTION IS ANOTHER WAY THAT DEVICES CAN BE LEGALLY  
17 MARKETING ALSO CALLED AN ID. AND THEN WE SEARCHED FOR ALL OF  
18 THE APPLICATION NUMBERS OF APPLICATIONS THAT THAT FIRM  
19 SUBMITTED TO THE AGENCY. THERE'S ALSO A PROCESS CALLED DE  
20 NOVO, AND WE SEARCHED FOR THAT. SO THAT'S WHY WE CAME UP WITH  
21 THOSE TERMS.

22 WE DID NOT SEARCH FOR THE LTD'S BECAUSE THE AGENCY DID NOT  
23 EVER TAKE THE POSITION THAT THESE -- THIS COMPANY'S PRODUCTS  
24 WERE LTD'S.

25 THE COURT: OKAY. THANK YOU VERY MUCH.

11:32AM 1 ANYTHING FURTHER BEFORE WE MOVE ON FROM THIS?

11:32AM 2 MR. WADE: ONLY ONE POINT, YOUR HONOR, THAT THE  
11:32AM 3 STATEMENT ABOUT THE FDA NOT REQUIRING REGULATION OF CERTAIN  
11:32AM 4 THERANOS TECHNOLOGY IS DIRECTLY CONTRADICTORY TO AN ALLEGATION  
11:33AM 5 IN PARAGRAPH 12(F) OF THE INDICTMENT.

11:33AM 6 SO THE POSITION BY FDA COUNSEL ONLY UNDERSCORES THE REASON  
11:33AM 7 WHY WE NEED THE MATERIAL RELATING TO THAT. IN SOME WAYS IT  
11:33AM 8 SEEMS LIKE WE MAY AGREE MORE WITH THE FDA THAN WE AGREE WITH  
11:33AM 9 THE UNITED STATES ASSISTANT ATTORNEYS PROCEEDING WITH THIS  
11:33AM 10 CASE, BUT ULTIMATELY IT'S GOING TO BE 12 JURORS WHO NEED TO  
11:33AM 11 DECIDE, AND WE NEED TO HAVE THE EVIDENCE THAT WE NEED TO PROVE  
11:33AM 12 OUR CASE.

11:33AM 13 THE COURT: OKAY. THANK YOU.

11:33AM 14 LET'S MOVE ON -- WE ARE LEFT WITH 4(A) AND (B) -- OR (C)  
11:33AM 15 PERHAPS. I THINK (C) WE TALKED ABOUT EARLIER SO I DON'T THINK  
11:33AM 16 WE NEED TO DEAL WITH THAT ANY FURTHER. THAT'S MR. GUTIERREZ.  
11:33AM 17 WE TALKED ABOUT CORRUPTION AND THOSE FILES.

11:33AM 18 SO I THINK WE'RE LEFT WITH THE DOCUMENTS THAT I THINK YOU  
11:34AM 19 INDICATE ARE IN YOUR OPINION UNINTELLIGIBLE.

11:34AM 20 MR. WADE: THE HEAVIEST REDACTIONS AND OMITTED  
11:34AM 21 DOCUMENTS I'VE SEEN IN MY CAREER, YOUR HONOR.

11:34AM 22 THE COURT: WELL, YOU'RE A RELATIVELY NEW  
11:34AM 23 PRACTITIONER, COUNSEL.

11:34AM 24 (LAUGHTER.)

11:34AM 25 MR. WADE: THANK YOU, YOUR HONOR.

1 WELL, THEN I HOPE I NEVER SEE SUCH HEAVILY REDACTED  
2 MATERIALS FOR THE 50 YEARS I HAVE LEFT.

3 THERE ARE SOME EXAMPLES THAT ARE ATTACHED TO THE  
4 PLEADINGS. IT'S HARD TO UNDERSTAND EXACTLY WHAT IS GOING ON  
5 HERE BECAUSE SOME OF THESE INTENTIONALLY WITHHELD MATERIALS ARE  
6 TECHNICAL ISSUES OR PRIVILEGED CLAIMS APPEAR. WE JUST DON'T  
7 EVEN REALLY KNOW WHAT IS GOING ON.

8 WHAT YOU HAVE IS A DOCUMENT THAT HAS A SUBJECT MATTER OF  
9 THERANOS AND THEN NO CONTENT WHATSOEVER.

10 NOW, IS THERE SOME WORLD IN WHICH THAT ISN'T RELEVANT? I  
11 MEAN, I GUESS MAYBE I COULD IMAGINE IT, BUT IT'S HARD TO  
12 IMAGINE.

13 ANOTHER MORE SPECIFIC ISSUE THAT WE HAVE, YOUR HONOR, IS  
14 IT'S BEEN SUGGESTED THAT DOCUMENTS WERE ONLY PRODUCED ONCE.

15 SO, FOR EXAMPLE, IF THERE'S AN E-MAIL WITH AN ATTACHMENT  
16 TO ONE GROUP OF PEOPLE, AND THAT ATTACHED DOCUMENT EXISTS  
17 SOMEWHERE ELSE, IT IS WITHHELD WITH THE OTHER -- THE SECOND  
18 E-MAIL AND THE THIRD E-MAIL WHICH CREATES HUGE EVIDENTIARY  
19 ISSUES IF THE COURT COULD JUST IMAGINE HOW WE WANT TO USE THESE  
20 DOCUMENTS IN THE CASE WITH DIFFERENT WITNESSES.

21 SO I DON'T THINK THERE'S A BASIS TO WITHHOLD DUPLICATIVE  
22 DOCUMENTS BASED ON THE FACT THAT THEY'RE ATTACHED TO DIFFERENT  
23 E-MAILS. THOSE AREN'T DUPLICATES IF THEY'RE ATTACHED TO  
24 DIFFERENT E-MAILS. IT'S IMPORTANT TO GET EACH ONE.

25 THE COURT: OKAY. ANYTHING, MR. COPPERSMITH?

11:35AM 1 MR. COOPERSMITH: YOUR HONOR, I WOULD JUST POINT OUT  
11:35AM 2 THAT WHEN YOU LOOK AT THE ATTACHMENT THAT WE HAVE PROVIDED IN  
11:35AM 3 THE STATUS REPORT THERE'S A PIE CHART PROVIDED TO SORT OF SUM  
11:35AM 4 UP THE MAGNITUDE OF THIS PROBLEM, WHICH IS, THAT, YOU KNOW, A  
11:35AM 5 HUGE PERCENT, 37 PERCENT WHERE MARKED AS INTENTIONALLY  
11:36AM 6 WITHHELD.

11:36AM 7 AND THEN WE PROVIDED SOME OTHER EXAMPLES WHERE, FOR  
11:36AM 8 EXAMPLE -- ONE EXAMPLE WAS OUR EXHIBIT D WHERE THERE'S AN  
11:36AM 9 E-MAIL THAT SAYS IT'S FROM MR. PILCHER, WHO IS AN FDA EMPLOYEE  
11:36AM 10 WHO PARTICIPATED IN THE INSPECTION FDA PERFORMED, AMONG OTHER  
11:36AM 11 THINGS.

11:36AM 12 AND IT SAYS, "ATTACHED PLEASE FIND MY INSPECTION NOTES  
11:36AM 13 DURING THE AUGUST 2016 INSPECTION," AND THEN EVERYTHING ELSE IS  
11:36AM 14 INTENTIONALLY WITHHELD.

11:36AM 15 SO THE IDEA THAT THOSE WERE NOT RESPONSIVE? I SUSPECT  
11:36AM 16 WHAT HAPPENED THERE IS WHAT MR. WADE WAS SAYING, WHICH IS THAT  
11:36AM 17 THEY DECIDED, WELL, ONE OF THOSE ATTACHMENTS WAS PRODUCED IN  
11:36AM 18 SOME FORM SOMEWHERE ELSE AND THEY SOMEHOW MADE THAT CONCLUSION.

11:36AM 19 BUT OBVIOUSLY AS MR. WADE SAID, IF I HAVE MR. PILCHER ON  
11:36AM 20 THE STAND, YOU KNOW, I HAVE NO WAY AS AN EVIDENTIARY MATTER TO  
11:36AM 21 SHOW THAT THIS WAS ACTUALLY AN ATTACHMENT TO HIS E-MAIL WITHOUT  
11:36AM 22 THOSE DOCUMENTS.

11:36AM 23 SO THAT METHOD OF DE-DUPLICATING I HAVE NEVER SEEN BEFORE  
11:36AM 24 AND DIDN'T MAKE ANY SENSE TO US, SO I THINK THEY NEED TO  
11:36AM 25 REVISIT THAT AS WELL.

11:36AM 1 THE COURT: OKAY. ANYTHING, MR. BOSTIC, ON THIS?

11:37AM 2 MR. BOSTIC: YES, YOUR HONOR. JUST A COUPLE OF  
11:37AM 3 THINGS.

11:37AM 4 I CAN'T SPEAK TO WHAT'S UNDERNEATH THE REDACTIONS THAT THE  
11:37AM 5 FDA EXECUTED ON ITS DOCUMENT PRODUCTIONS. I THINK I'LL COME  
11:37AM 6 BACK TO THAT POINT LATER WHEN WE TALK ABOUT WHETHER RULE 16  
11:37AM 7 APPLIES HERE OR NOT.

11:37AM 8 AS TO THE PRACTICE OF ONLY PRODUCING DOCUMENTS ONCE SUCH  
11:37AM 9 THAT SOME PRODUCED DOCUMENTS SAY "INTENTIONALLY WITHHELD," AND  
11:37AM 10 IT'S DIFFICULT FOR THE DEFENSE TO KNOW, AND FOR THE GOVERNMENT  
11:37AM 11 TO KNOW, WHICH DOCUMENT THAT ACTUALLY IS AND WHERE ELSE THEY  
11:37AM 12 MAY FIND IT IN THE PRODUCTION. I AGREE WITH THE DEFENSE THAT  
11:37AM 13 THEY NEED TO FIND A SOLUTION TO THAT. I'M NOT IN A POSITION TO  
11:37AM 14 PROVIDE THAT SOLUTION, BUT I AGREE THAT IT IS A PROBLEM.

11:37AM 15 THE COURT: OKAY.

11:37AM 16 MR. BOSTIC: AS TO THE REDACTIONS, I'LL JUST POINT  
11:37AM 17 OUT THAT MY UNDERSTANDING IS THAT TO THE EXTENT THAT THE  
11:37AM 18 DEFENSE HAS PROVIDED EXAMPLES OF POSSIBLY INAPPROPRIATE  
11:37AM 19 REDACTIONS TO AGENCY COUNSEL, THEY'VE REVIEWED THEM AND  
11:37AM 20 CONFIRMED THAT WHAT IS UNDERNEATH THOSE REDACTIONS HAS NOTHING  
11:38AM 21 TO DO WITH THERANOS.

11:38AM 22 AGAIN, I HAVE TO TAKE THE AGENCY'S WORD FOR THAT, BUT I  
11:38AM 23 HAVE NO REASON TO DOUBT THEM IF THEY HAVE DONE THAT REVIEW.

11:38AM 24 THE COURT: WAS THERE -- LET ME ASK ANOTHER QUESTION  
11:38AM 25 BEFORE I GO BACK TO THE DEFENSE HERE.

11:38AM 1 WAS THERE -- I THOUGHT THAT THE AGENCIES WERE GOING TO  
11:38AM 2 DEVELOP A PRIVILEGE LOG AT SOME POINT IN TIME.

11:38AM 3 DID THAT -- I REMEMBER SOME COMMENT ABOUT THAT.

11:38AM 4 MR. COOPERSMITH: WE HAVE NOT SEEN ONE, YOUR HONOR.

11:38AM 5 THE COURT: OKAY. OKAY. SO LET ME TURN TO  
11:38AM 6 MS. MARTINEZ-RESLY. DO YOU WISH TO COMMENT?

11:38AM 7 MS. MARTINEZ-RESLY: YES, YOUR HONOR.

11:38AM 8 SO THE DOCUMENTS THAT THE FDA WITHHELD AND PRODUCED TO  
11:38AM 9 PARTIES AS INTENTIONALLY WITHHELD WITH THAT SLIP SHEET  
11:38AM 10 INDICATING THAT PHRASE, WERE FOR THREE REASONS:

11:38AM 11 ONE WAS IF THAT DOCUMENT WAS COMPLETELY NONRESPONSIVE; ONE  
11:38AM 12 WAS IF THAT DOCUMENT WAS ENTIRELY PRIVILEGED; AND ONE WAS, AS  
11:39AM 13 THE PARTIES HAD BEEN DISCUSSING JUST NOW, WAS IF THAT DOCUMENT  
11:39AM 14 WAS DUPLICATIVE OF ANOTHER DOCUMENT THAT THE PARTIES ALREADY  
11:39AM 15 HAD VIA FDA'S INITIAL PRODUCTION OF DOCUMENTS TO THE DEPARTMENT  
11:39AM 16 OF JUSTICE, WHICH THE DEPARTMENT OF JUSTICE WE UNDERSTAND HAS  
11:39AM 17 ALREADY PROVIDED TO THE DEFENDANTS, OR DUPLICATIVE OF ANOTHER  
11:39AM 18 DOCUMENT IN OUR REVIEW DATABASE, WHICH MEANS THAT IT WILL  
11:39AM 19 EVENTUALLY BE REVIEWED AND PRODUCED IF IT HAS NOT BEEN ALREADY.

11:39AM 20 AND THE REASON FOR THIS APPROACH IS THAT -- THERE ARE  
11:39AM 21 MULTIPLE REASONS. ONE IS THE LARGE, THE LARGE NUMBER -- AND  
11:39AM 22 KIND OF THE LARGE NUMBER OF DOCUMENTS THAT WERE YIELDED FROM  
11:39AM 23 OUR SEARCH OF OVER 80 CUSTODIANS. I BELIEVE IN OUR  
11:40AM 24 SEPTEMBER 23RD LETTER TO MR. BALWANI WE POINTED OUT THAT OUR  
11:40AM 25 SEARCH FOR 65 CUSTODIANS YIELDED OVER 150,000 DOCUMENTS, AND WE

1 KNEW AND UNDERSTOOD THAT THE PARTIES ALREADY HAD ABOUT  
2 40,000 PAGES OF FDA DOCUMENTS.

3 WE ALSO UNDERSTOOD THAT THE COURT WANTED US TO PRODUCE THE  
4 DOCUMENTS RESPONSIVE TO THE MOTION TO COMPEL IN AS EFFICIENT A  
5 MANNER AS POSSIBLE. SO WE EXERCISED OUR -- THIS, THIS  
6 DE-DUPLICATION PROCESS IN ORDER TO MEET THE COURT'S DEADLINE  
7 AND IN OUR GOOD FAITH UNDERSTANDING WE UNDERSTOOD THAT THE  
8 PARTIES ALREADY HAD THESE DOCUMENTS IF THEY WERE DUPLICATIVE.

9 I UNDERSTAND THAT IT IS -- FROM WHAT THE PARTIES HAVE SAID  
10 IN COURT TODAY AND DURING OUR MEET AND CONFER THAT IT IS  
11 SOMETIMES DIFFICULT TO FIND THE DUPLICATIVE DOCUMENT AMONG THE  
12 PRODUCTION OF DOCUMENTS THAT THEY ALREADY HAVE, AND SO WE SAID  
13 AT THE MEET AND CONFER, AND I THINK WE SAID AGAIN IN THIS  
14 OCTOBER 30TH LETTER, THAT WE ARE REVIEWING A LIST OF DOCUMENTS  
15 THAT MR. BALWANI'S COUNSEL HAS PROVIDED TO US THAT THEY WOULD  
16 LIKE US TO CONSIDER REPRODUCING IN FULL, AND WE ARE REVIEWING  
17 THAT, AND WE WILL GET BACK TO THEM.

18 THE COURT: OKAY. CAN YOU TELL ME, WHEN DO YOU  
19 THINK YOU'LL BE ABLE TO GET BACK TO THEM?

20 MS. MARTINEZ-RESLY: I BELIEVE WE CAN GET BACK TO  
21 THEM IN A COUPLE OF WEEKS WITH AN UPDATE.

22 THE COURT: ALL RIGHT. THANK YOU.

23 MS. MARTINEZ-RESLY: YOUR HONOR, MAY I ALSO ADD ONE  
24 OTHER THING? WE'VE ALSO COMMITTED TO REVIEW ALL OF OUR  
25 REDACTIONS FOR THE LAW ENFORCEMENT PRIVILEGE BECAUSE THAT WAS

11:42AM 1 BROUGHT TO OUR ATTENTION DURING THE LAST MEET AND CONFER AS  
11:42AM 2 WELL. SO WE ARE VOLUNTARILY UNDERTAKING A REVIEW OF THOSE  
11:42AM 3 DOCUMENTS.

11:42AM 4 THE COURT: ALL RIGHT. THANK YOU.

11:42AM 5 MR. BOSTIC, ANYTHING TO ADD?

11:42AM 6 MR. BOSTIC: NO, YOUR HONOR -- ACTUALLY, YES, YOUR  
11:42AM 7 HONOR. I THINK IT'S IMPORTANT TO NOTE THE AMOUNT OF EFFORT  
11:42AM 8 THAT THE AGENCIES HAVE PUT IN HERE. I KNOW THAT THE COURT  
11:42AM 9 THANKED THEM EARLIER, AND FOR THE GOVERNMENT I WOULD LIKE TO  
11:42AM 10 THANK THEM ALSO FOR THAT WORK.

11:42AM 11 I ASKED THE AGENCIES TO ESTIMATE HOW MANY EMPLOYEE HOURS  
11:42AM 12 THEY HAD SPENT ON RESPONDING TO THIS ROUND OF DOCUMENT  
11:42AM 13 REQUESTS, AND THE NUMBERS WERE HIGHER THAN I THOUGHT THEY WERE  
11:42AM 14 GOING TO BE.

11:42AM 15 THE FDA ESTIMATES THAT IT SPENT APPROXIMATELY 2,600 HOURS  
11:42AM 16 RESPONDING TO THESE DOCUMENT REQUESTS FOR THE PAST SEVERAL  
11:42AM 17 MONTHS. CMS, FOR ITS PART, ESTIMATES THAT IT SPENT  
11:42AM 18 2,100 EMPLOYEE HOURS RESPONDING TO THESE REQUESTS.

11:42AM 19 SO I SAY THAT NOT BECAUSE THAT'S HOW WE MEASURE  
11:43AM 20 COMPLIANCE. THERE'S NO MAGIC NUMBER THAT ONCE THEY GET TO IT  
11:43AM 21 WE SAY, OKAY, WE'RE GOING TO LEAVE YOU ALONE. BUT I DON'T WANT  
11:43AM 22 THERE TO BE ANY QUESTION THAT THE AGENCIES HAVEN'T DEVOTED A  
11:43AM 23 TREMENDOUS AMOUNT OF RESOURCES RESPONDING TO THESE REQUESTS AND  
11:43AM 24 THAT THEY'VE DONE SO IN GOOD FAITH.

11:43AM 25 THE COURT: OKAY. THANK YOU FOR THAT.



11:43AM 1 MR. COPPERSMITH.

11:43AM 2 MR. COOPERSMITH: YES, YOUR HONOR. I JUST WANT TO  
11:43AM 3 MAKE IT CLEAR THAT FOR THE INDIVIDUAL PEOPLE INVOLVED WHO ARE  
11:43AM 4 ON THE PHONE, AND THE OTHERS WHO ARE COLLECTING DOCUMENTS, WE  
11:43AM 5 UNDERSTAND THAT THEY'RE WORKING ON THIS, AND WE DO APPRECIATE  
11:43AM 6 THAT.

11:43AM 7 OBVIOUSLY WHEN WE'RE TALKING ABOUT THE DEFENDANT'S  
11:43AM 8 CONSTITUTIONAL RIGHTS AND THE GOVERNMENT ELECTING TO BRING THIS  
11:43AM 9 PROSECUTION, YOU KNOW, THEY'RE GOING TO HAVE TO DO WHAT IT  
11:43AM 10 TAKES TO MAKE SURE THAT THEIR RIGHTS ARE PROTECTED AND THE  
11:43AM 11 COURT'S ORDERS ARE FOLLOWED.

11:43AM 12 BUT I WANT TO MAKE A MORE SPECIFIC POINT AND THAT IS TO  
11:43AM 13 ADDRESS SOME OF THE THINGS THAT WE JUST HEARD FROM THE PHONE  
11:43AM 14 SPEAKER.

11:43AM 15 WE DID AN ANALYSIS, YOUR HONOR, BECAUSE MR. BOSTIC HAD  
11:43AM 16 SUGGESTED THAT MAYBE THE DOCUMENTS WE WERE GETTING ARE JUST  
11:43AM 17 DUPLICATIVE OF WHAT THE GOVERNMENT ALREADY GAVE US. WE DID AN  
11:43AM 18 ANALYSIS WITH OUR ANALYTICS DEPARTMENT TO SEE WHETHER THE  
11:44AM 19 DOCUMENTS WE'RE NOW GETTING AND STARTING TO GET ARE DUPLICATIVE  
11:44AM 20 OF ANYTHING, AND WE FOUND THAT OVER 90 PERCENT OF THE DOCUMENTS  
11:44AM 21 BEING PRODUCED BY THE AGENCY ARE NOVEL, NEW DOCUMENTS THAT WE  
11:44AM 22 HAVE NOT SEEN BEFORE FROM THE DEPARTMENT OF JUSTICE IN THEIR  
11:44AM 23 PRODUCTION.

11:44AM 24 SO LEST THERE BE ANY DOUBT THAT THE DATA, THE RECORD SHOWS  
11:44AM 25 THAT IT'S NOT THE CASE THAT WE'RE JUST GETTING DUPLICATIVE

11:44AM 1 MATERIAL AND MAKING THESE PEOPLE SPIN THEIR WHEELS FOR NO  
11:44AM 2 REASON. WE'RE GETTING DOCUMENTS THAT ARE REALLY IMPORTANT AND  
11:44AM 3 CRUCIAL TO THE DEFENSE.

11:44AM 4 AND THE OTHER THING I WANTED TO MENTION, YOUR HONOR, IS  
11:44AM 5 THAT I UNDERSTAND, YOU KNOW, WE HAD A DISCUSSION ABOUT THIS  
11:44AM 6 SEARCH TERM LTD, BUT I WANT TO JUST LINK THAT TO THE  
11:44AM 7 DELIBERATIVE PROCESS PRIVILEGE POINT THAT WE'VE BEEN HEARING  
11:44AM 8 ABOUT NOW.

11:44AM 9 THE COURT: HASN'T THAT BEEN WAIVED BY THE PARTIES?

11:44AM 10 MR. COOPERSMITH: YES, YOUR HONOR. AND JUST TO BE  
11:44AM 11 CLEAR, THOUGH, WHAT MY UNDERSTANDING OF THE WAIVER IS, IS THAT  
11:44AM 12 THE AGENCIES HAVE WAIVED THE DELIBERATIVE PROCESS FOR MATERIAL  
11:44AM 13 THAT RELATES TO THERANOS, BUT IF THEY HAVE SOME OTHER COMPANY  
11:44AM 14 OR SOME OTHER DISCUSSION THAT DOESN'T RELATE TO THERANOS, THEN  
11:45AM 15 THEY HAVE NOT WAIVED THE DELIBERATIVE PROCESS. SO THOSE, I  
11:45AM 16 WOULD ASSUME, WOULD BE THE DOCUMENTS THAT SHOW UP ON A  
11:45AM 17 PRIVILEGE LOG WHEN THEY GET AROUND TO THAT.

11:45AM 18 THE QUESTION, THOUGH, YOUR HONOR, IS HOW DO YOU DETERMINE  
11:45AM 19 WHAT RELATES TO THERANOS AND WHAT DOESN'T? AND WHAT WE KNOW  
11:45AM 20 ABOUT THIS CASE IS THAT AT HIGH LEVELS OF THE FDA IN 2014 AND  
11:45AM 21 2015 THEY WERE NOT ONLY TALKING INTERNALLY ABOUT HOW AND  
11:45AM 22 WHETHER TO REGULATE THERANOS, THEY WERE ALSO TALKING ABOUT NEW  
11:45AM 23 POLICY GUIDANCE THEY WERE TRYING TO ISSUE ABOUT LTD'S IN  
11:45AM 24 GENERAL THAT WOULD APPLY NATIONWIDE TO ALL COMPANIES.

11:45AM 25 SO WE SEE IN THE DOCUMENTS THERE ARE TIMES WHEN HIGH-LEVEL

11:45AM 1 FDA PEOPLE EVEN TELL THE U.S. CONGRESS AND OTHERS THAT THERANOS  
11:45AM 2 IS AN EXAMPLE OF WHY WE NEED TO REGULATE LTD'S, OR THERANOS AND  
11:45AM 3 THESE OTHER TEN COMPANIES ARE REASONS WHY WE WANT TO CHANGE THE  
11:45AM 4 WAY WE REGULATE LTD'S.

11:45AM 5 SO WHEN THEY'RE TALKING ABOUT THOSE HIGH-LEVEL POLICY  
11:45AM 6 DISCUSSIONS, WE THINK THAT'S HIGHLY MATERIAL TO THE DEFENSE.

11:46AM 7 AND WHAT I THINK HAS HAPPENED HERE IS THAT IF THE  
11:46AM 8 DISCUSSION WASN'T SPECIFICALLY RELATED TO A THERANOS MATTER  
11:46AM 9 THAT IS EXISTING AT SOME POINT IN TIME, THEY'VE DECIDED TO MAKE  
11:46AM 10 DELIBERATIVE PROCESS ARGUMENTS, BUT UNLESS YOU SEE THE CONTEXT  
11:46AM 11 OF HOW THIS AGENCY WAS TRYING TO DO THINGS OVERALL.

11:46AM 12 SO I THINK THAT QUESTION OF WHAT IS RELATED TO THERANOS  
11:46AM 13 AND WHAT IS NOT IS PERHAPS A DIFFICULT ONE, BUT IT CERTAINLY  
11:46AM 14 SHOULDN'T BE ERRED ON THE SIDE OF NOT GIVING US THE DOCUMENTS,  
11:46AM 15 WHICH I THINK IS WHAT HAS HAPPENED SO FAR.

11:46AM 16 THE COURT: OKAY.

11:46AM 17 MR. BOSTIC: YOUR HONOR, ON THAT POINT. SO I THINK  
11:46AM 18 WE'RE BACK TO THE SEARCH TERM DISCUSSION TEMPORARILY. ABOUT 20  
11:46AM 19 MINUTES AGO I THINK MR. COPPERSMITH SAID THIS IS NOT ABOUT  
11:46AM 20 EXPANDING THE SCOPE OF THE COURT'S ORDER, BUT THAT'S WHAT I'M  
11:46AM 21 HEARING RIGHT NOW. I'M HEARING THAT NOT ONLY DOES THE DEFENSE  
11:46AM 22 WANT DISCUSSIONS ABOUT LTD'S IN RELATION TO THERANOS, BUT ALSO  
11:46AM 23 ABOUT LTD'S IN GENERAL.

11:46AM 24 NOWHERE IN THE SIX CATEGORIES THAT THE DEFENSE PROVIDED  
11:46AM 25 THAT THE COURT ORDERED IS THAT CALLED FOR. THAT SIMPLY IS NOT

11:47AM 1 RESPONSIVE TO THESE CATEGORIES.

11:47AM 2 SAME THING WITH "THERANOS" BY THE WAY AS A STANDALONE  
11:47AM 3 TERM. IF ONE OF THE CATEGORIES REQUESTED ALL DOCUMENTS  
11:47AM 4 RELATING TO OR MENTIONING THERANOS, THEN IT WOULD MAKE SENSE TO  
11:47AM 5 HAVE A STANDALONE TERM FOR THERANOS.

11:47AM 6 BUT MY CONCERN IS THAT BY DEMANDING SEARCH TERMS LIKE LTD  
11:47AM 7 AND THERANOS STANDING ALONE, THEY ARE SEEKING DOCUMENTS THAT  
11:47AM 8 ARE CLEARLY OUTSIDE THE FOUR CORNERS OF THE SIX REQUESTS THAT  
11:47AM 9 THEY SELECTED AND THAT THE COURT ORDERED AND THAT THE  
11:47AM 10 GOVERNMENT REQUESTED.

11:47AM 11 THE COURT: OKAY. THANK YOU.

11:47AM 12 MR. COOPERSMITH: YOUR HONOR, TO BE MORE SPECIFIC TO  
11:47AM 13 TRY TO ADDRESS MR. BOSTIC'S CONCERNS, WHAT WE'RE LOOKING FOR,  
11:47AM 14 WHICH I THINK IS PART OF THE COURT ORDER, NOT AN EXPANSION, IS  
11:47AM 15 HOW THE FDA WAS PLANNING TO APPLY THEIR POLICY ABOUT LTD'S TO  
11:47AM 16 THERANOS, AND THAT'S DIRECTLY RESPONSIVE TO CATEGORY 4.

11:47AM 17 IF THERE'S SOME DISCUSSION THEY'RE HAVING THAT IS  
11:47AM 18 COMPLETELY DIVORCED FROM ANYTHING HAVING TO DO WITH THERANOS,  
11:48AM 19 THAT'S A DIFFERENT MATTER.

11:48AM 20 BUT HOW THEY APPLY THEIR POLICY AND THE POLICIES OR HOW  
11:48AM 21 THEY MAY WISH TO APPLY IT TO THERANOS I THINK IS DIRECTLY  
11:48AM 22 RELATED TO THE COURT ORDER.

11:48AM 23 THE COURT: WELL, HOW DO YOU PUT THAT INTO A SEARCH  
11:48AM 24 TERM?

11:48AM 25 MR. COOPERSMITH: IT'S NOT A MATTER OF A SEARCH

11:48AM 1 TERM. THERE'S NO REASON TO ADDRESS THE SEARCH TERM. THE  
11:48AM 2 SEARCH TERM IS THE LTD THAT WE'VE TALKED ABOUT.

11:48AM 3 THE QUESTION IS WHEN YOU FIND THE HITS WHEN YOU HAVE THE  
11:48AM 4 DOCUMENTS. NOW, THE FDA IS GOING TO HAVE, AND I GUESS BOTH  
11:48AM 5 AGENCIES, HAVE TO DECIDE WHAT ARE WE GOING TO WITHHOLD AS  
11:48AM 6 DELIBERATIVE PROCESS? SO IT'S MORE OF A QUESTION OF HOW  
11:48AM 7 BROADLY ARE THEY GOING TO SEARCH DELIBERATIVE PROCESS. IT'S  
11:48AM 8 NOT A SEARCH TERMS ISSUE AT ALL.

11:48AM 9 THE COURT: SO YOU'RE TRYING TO POLICE THIS, IF YOU  
11:48AM 10 WILL, UPFRONT. AT SOME POINT IN TIME THERE WILL BE A  
11:48AM 11 DISCUSSION, I ASSUME YOU'LL RAISE IT, THE DEFENSE TEAM WILL  
11:48AM 12 RAISE IT ABOUT ANY PRIVILEGE LOG THAT EXISTS, AND WE'LL HAVE TO  
11:48AM 13 LOOK AT THAT AND DETERMINE WHETHER OR NOT IT WAS APPROPRIATELY  
11:48AM 14 WITHHELD OR THE REASONS THEREFOR.

11:48AM 15 MR. COOPERSMITH: YES, YOUR HONOR. AND THAT'S A  
11:48AM 16 VERY FINE WAY TO DEAL WITH THE PROBLEM, BECAUSE THAT'S  
11:48AM 17 TRADITIONAL IS THAT THE PARTY WITHHOLDING DOCUMENTS, THEY'RE  
11:48AM 18 DECIDING SOMETHING IS PRIVILEGED. THEY MAKE A PRIVILEGE LOG.

11:49AM 19 AND THEN WE LOOK AT IT AND CHALLENGE WHAT WE THINK IS NOT  
11:49AM 20 WARRANTED.

11:49AM 21 MR. WADE: ON THAT POINT, YOUR HONOR, BUT IN THE  
11:49AM 22 INTEREST OF THE DIALOGUE THAT WE'VE HAD WITH THE OTHER PARTIES  
11:49AM 23 TO TRY AND GET AT THIS EFFICIENTLY, WE JUST WANTED TO RAISE  
11:49AM 24 THAT ISSUE NOW.

11:49AM 25 THE COURT: SURE.

11:49AM 1 MR. WADE: BECAUSE THERE HAVE BEEN TIMES WHEN WE'VE  
11:49AM 2 BEEN ACCUSED OF NOT BEING RESPONSIVE OR NOT GIVING NOTICE.

11:49AM 3 FOR EXAMPLE, ON THE SEARCH TERMS, MS. HOLMES FILED THIS  
11:49AM 4 MOTION AND OUR INPUT ON SEARCH TERMS WAS NEVER REQUESTED. WHAT  
11:49AM 5 IS NEWS TO ME IS THE FACT THAT I LEARNED EARLIER TODAY THAT  
11:49AM 6 THERE WAS ANY SOLICITATION OF THAT. SO WE WOULD HAVE BEEN  
11:49AM 7 HAPPY TO PROVIDE THOSE SEARCH TERMS.

11:49AM 8 THE COURT: YOUR COLLEAGUE DIDN'T TELL YOU THAT?

11:49AM 9 MR. WADE: WELL, OUR COLLEAGUE IS PRESENT AND HAS A  
11:49AM 10 DIFFERENT CASE PENDING BEFORE THE COURT THAT WE'RE NOT A PARTY  
11:49AM 11 TO.

11:49AM 12 MY GUESS IS THAT IT WAS PART OF A MEET AND CONFER PROCESS  
11:49AM 13 THERE THAT I THINK WAS SORT OF PUT ON HOLD BECAUSE OF THE  
11:49AM 14 LITIGATION RELATING TO THIS MOTION.

11:49AM 15 SO WE'RE RAISING THIS ISSUE WITH REGARD TO THE  
11:50AM 16 DELIBERATIVE PROCESS ISSUE NOW SO THAT PERHAPS WE CAN AVOID  
11:50AM 17 TAKING TOO NARROW OF A VIEW AND HAVING FIGHTS OVER THAT FOR  
11:50AM 18 MONTHS TO COME.

11:50AM 19 THE COURT: OKAY. I APPRECIATE THAT.

11:50AM 20 AND I ALSO APPRECIATE MS. MARTINEZ-RESLY'S COMMENTS ABOUT  
11:50AM 21 THIS. WE MAY, IN MY OBSERVATIONS, THAT IT MAY BE THAT WE'LL  
11:50AM 22 HAVE ADDITIONAL DISCUSSION OVER IF THERE IS A PRIVILEGE LOG OR  
11:50AM 23 NOT OR ITEMS THAT PRESENT ITSELF ON THAT AND THE REASONS FOR  
11:50AM 24 THAT, AND THERE'S A TIME TO GET THAT DONE.

11:50AM 25 AGAIN, EVERYTHING WE'RE TALKING ABOUT HERE, AND I REALLY

11:50AM 1 HATE TO USE THE WORD "EFFICIENCY" OR "SPEED" OR ANYTHING LIKE  
11:50AM 2 THAT IN A CRIMINAL CASE, BUT WE HAVE A TRIAL DATE, AND WE HAVE  
11:50AM 3 SOME DATES SET. I WANT TO LOOK TO YOUR PROPOSED SCHEDULE ALSO  
11:50AM 4 IN A MOMENT, BUT I DO -- I'M NOT GOING TO DISTURB THE TRIAL  
11:50AM 5 DATE.

11:50AM 6 I LOOK AT MR. SCHENK AND I MADE HIM, I DON'T KNOW IF IT  
11:50AM 7 WAS A PROMISE, BUT IT WAS AT LEAST AN ASSURANCE, A STRONG  
11:51AM 8 ASSURANCE THAT WE WOULDN'T DISTURB THE TRIAL DATES. YOU ALL  
11:51AM 9 HAVE PLANNED YOUR LIVES NEXT YEAR AROUND THAT, I'M SURE YOU  
11:51AM 10 HAVE, AND I REALLY DON'T WANT TO DISTURB THAT.

11:51AM 11 TO THE EXTENT THAT WE CAN GET THIS INITIAL DISCOVERY PHASE  
11:51AM 12 COMPLETED, WE CAN MOVE ON TO THE IMPORTANT ISSUES THAT YOU'RE  
11:51AM 13 GOING TO PRESENT I'M SURE.

11:51AM 14 MR. COOPERSMITH: THANK YOU, YOUR HONOR. YES, WE'RE  
11:51AM 15 AWARE OF THE TRIAL DATE, OF COURSE, AND ARE PLANNING.

11:51AM 16 JUST TO CLOSE THE LOOP ON ONE THING, IN THE S.E.C. -- AND  
11:51AM 17 I DON'T WANT TO ARGUE S.E.C. MATTERS BECAUSE WE'RE NOT BEFORE  
11:51AM 18 THE COURT ON THAT -- BUT SINCE AGENCY COUNSEL RAISED THIS  
11:51AM 19 QUESTION OF SEARCH TERMS. I THINK IT'S IMPORTANT TO NOTE THAT  
11:51AM 20 THOSE SUBPOENAS WERE SERVED IN SEPTEMBER 2018. WE GOT NOTHING  
11:51AM 21 MORE THAN A BARE LITTLE TRICKLE OF DOCUMENTS UNTIL THIS COURT  
11:51AM 22 ORDERED DOCUMENTS TO BE PRODUCED IN THE CRIMINAL CASE.

11:51AM 23 SINCE THEN WE HAVE AGREED WITH THE AGENCIES THAT THE  
11:51AM 24 PRODUCTION UNDER THE CRIMINAL ORDER WOULD ALSO BE PRODUCTION  
11:51AM 25 UNDER THE CIVIL AND ALSO WE'VE TOLD THE AGENCIES THAT WE'RE NOT

11:51AM 1 GOING TO ASK FOR ANYTHING MORE THAN WHAT IS ULTIMATELY PRODUCED  
11:52AM 2 UNDER THE CRIMINAL ORDER AS THE COURT DIRECTS.

11:52AM 3 SO THIS ISSUE OF SEARCH TERMS, THEY NEVER SEARCHED FOR  
11:52AM 4 ANYTHING. THEY BASICALLY NEVER DID ANYTHING UNTIL THE COURT  
11:52AM 5 ORDERED THE PRODUCTION ON THE CRIMINAL SIDE.

11:52AM 6 THE COURT: OKAY. ALL RIGHT.

11:52AM 7 ANY FURTHER OBSERVATIONS BEFORE? I THINK WE'VE -- DARE I  
11:52AM 8 USE THE WORD? -- EXHAUSTED TOPICS FOR TODAY.

11:52AM 9 MR. BOSTIC, YOU WANTED TO PUT SOMETHING ON THE RECORD,  
11:52AM 10 THOUGH.

11:52AM 11 MR. BOSTIC: YES, YOUR HONOR, JUST ON THE MATTER OF  
11:52AM 12 WHETHER RULE 16 SHOULD APPLY DIRECTLY HERE.

11:52AM 13 THE COURT: YES.

11:52AM 14 MR. BOSTIC: I THINK THE COURT WAS CORRECT AT THE  
11:52AM 15 BEGINNING WHEN IT SAID THAT ITS APPROACH TO DATE HAD YIELDED  
11:52AM 16 PROGRESS AND THAT IS ABSOLUTELY TRUE, AND I DON'T WANT TO LOSE  
11:52AM 17 SIGHT OF THAT.

11:52AM 18 BACK AT THE BEGINNING OF THIS CONVERSATION THAT WE'VE BEEN  
11:52AM 19 HAVING THE AGENCIES WERE RAISING OBJECTIONS ABOUT THE RELEVANCE  
11:52AM 20 OF CERTAIN TOPICS. THEY WERE ESTIMATING THAT THEIR PRODUCTION  
11:52AM 21 WOULD TAKE MONTHS UPON MONTHS TO COMPLETE THROUGH COURT ORDERS  
11:52AM 22 AND THROUGH THE PROSECUTION'S WORK IN SECURING THE WAIVER FROM  
11:52AM 23 THE ASSIGNEE, AND NEGOTIATING APPROPRIATE PROTECTIVE ORDERS  
11:53AM 24 WITH THE COURT. WE'VE OVERCOME MANY OF THE OBSTACLES THAT WERE  
11:53AM 25 PREVENTING THOSE PRODUCTIONS FROM PROCEEDING.



1 THE AGENCIES HAVE PRODUCED THE DOCUMENTS THAT THEY PLEDGED  
2 TO PRODUCE SEVERAL MONTHS AGO. I THINK IT WAS IN JULY WHEN  
3 THEY SENT THEIR INITIAL LETTER SAYING HERE'S WHAT WE'LL DO.

4 THE COURT USED A BASEBALL ANALOGY EARLIER, AND NOW I WANT  
5 TO TALK ABOUT MOVING GOALPOSTS. I THINK THAT'S A DIFFERENT  
6 SPORT, MAYBE FOOTBALL.

7 THE COURT: IT'S THE CURRENT SEASON SO THAT'S  
8 APPROPRIATE.

9 MR. BOSTIC: I THINK THAT IS WHAT IS HAPPENING HERE,  
10 YOUR HONOR -- AND THE AGENCIES ARE ACCOMMODATING IT I THINK TO  
11 THE EXTENT THAT THEY CAN -- THEY COMPLETED THEIR INITIAL ROUNDS  
12 OF PRODUCTION AND THEN THE DEFENSE COMPLAINED ABOUT DATE  
13 RESTRICTIONS USED BY CMS AND CUSTODIANS WHO WERE NOT INCLUDED  
14 IN FDA'S INITIAL COLLECTIONS.

15 WE'VE DISCUSSED BEFORE THE MERITS OF THOSE POSITIONS SO I  
16 WON'T RELITIGATE THEM NOW, BUT SUFFICE IT TO SAY THE AGENCIES  
17 STAND BY, AND MY UNDERSTANDING IS THAT THEY STAND BY THEIR  
18 INITIAL DOCUMENT COLLECTION PROCEDURES, BUT THEY STILL  
19 ACCOMMODATED THE DEFENDANT'S REQUESTS TO EXPAND THEIR SEARCHES,  
20 CMS EXPANDING THE SCOPE OF TIME THAT IT WAS LOOKING AT FOR ITS  
21 DOCUMENT COLLECTION, AND FDA ADDING I BELIEVE EVERY CUSTODIAN  
22 THAT DEFENDANTS POINTED OUT, EVEN THOUGH FDA INFORMS US THAT  
23 THOSE ARE RELATIVELY MINOR EMPLOYEES WHOSE DOCUMENTS MIGHT HAVE  
24 ALREADY BEEN CAPTURED.

25 SO THAT'S THE COLLECTION THAT THEY'RE DOING NOW. THE

11:54AM 1 REVIEW WILL HAPPEN. THE PRODUCTION WILL HAPPEN. THIS PROCESS  
11:54AM 2 IS WORKING. THE DEFENSE IS NOW RAISING CONCERNS ABOUT  
11:54AM 3 REDACTIONS AND TECHNICAL ISSUES.

11:54AM 4 I THINK SIMILARLY WE CAN OVERCOME THOSE CONCERNS USING THE  
11:54AM 5 SAME PROCESS THAT WE HAVE BEEN USING.

11:54AM 6 MY CONCERN WITH A COURT ORDER THAT WOULD PUT THE  
11:54AM 7 GOVERNMENT IN CHARGE OF OVERSEEING A PRODUCTION IS THAT I DON'T  
11:54AM 8 THINK ANY BENEFIT WILL BE GAINED FROM IT. I THINK THE COURT  
11:54AM 9 ALREADY KNOWS THAT THE GOVERNMENT IS WORKING AS HARD AS IT CAN  
11:54AM 10 TO GET THESE DOCUMENTS PRODUCED.

11:55AM 11 THERE'S NOTHING MORE THAT WE COULD DO WITH THAT ORDER THAT  
11:55AM 12 WE CAN'T DO NOW.

11:55AM 13 AND LOOKING AT THE SPECIFIC TOPICS THAT WE DISCUSSED  
11:55AM 14 TODAY, IT'S UNCLEAR HOW THE GOVERNMENT, THE PROSECUTION THAT  
11:55AM 15 IS, CAN DO ANYTHING TO MOVE THE BALL FORWARD ON THOSE TOPICS.

11:55AM 16 WHEN WE TALK ABOUT TECHNICAL ISSUES, THERE'S NOTHING THE  
11:55AM 17 PROSECUTION CAN DO TO RESOLVE THOSE.

11:55AM 18 WHEN IT COMES TO TEXT MESSAGES, IT'S DOUBTFUL, ACCORDING  
11:55AM 19 TO AGENCY COUNSEL, WHETHER THE AGENCY EVEN HAS ACCESS TO  
11:55AM 20 CERTAIN EMPLOYEE TEXT MESSAGES. HOW MUCH LESS DOES THE  
11:55AM 21 PROSECUTION HAVE ACCESS TO THOSE TEXT MESSAGES? WE GET TEXT  
11:55AM 22 MESSAGES THROUGH SEARCH WARRANTS WHEN WE NEED TO SEE THEM BUT  
11:55AM 23 ONCE WE'RE SERVING -- ONCE WE'RE EXECUTING A SEARCH WARRANT TO  
11:55AM 24 GET EVIDENCE, WE'RE SO FAR AWAY FROM THE CONCEPT OF ACCESS  
11:55AM 25 UNDER RULE 16, I THINK THAT SPEAKS FOR ITSELF.

1 SAME THING ON THE ISSUE OF TIMING. THE GOVERNMENT HAS  
2 MADE THE LTSC AVAILABLE TO CMS, AND I BELIEVE THAT HAS SPED UP  
3 SOME OF THEIR REVIEW AND PRODUCTION WORK. BEYOND THAT, THERE'S  
4 NOTHING THAT THE PROSECUTION CAN DO TO MAKE THE AGENCIES MOVE  
5 FASTER. I THINK THE COURT IS CONSIDERING AN ORDER THAT MAY DO  
6 THAT, BUT THE COURT HAS THAT AUTHORITY WHERE THE PROSECUTION  
7 DOES NOT.

8 FINALLY, ON THE ISSUES OF REDACTIONS AND PRIVILEGE LOGS,  
9 AGENCY COUNSEL TOLD THE COURT EARLIER THAT THE AGENCIES WOULD  
10 NOT, COULD NOT PROVIDE THE GOVERNMENT WITH MATERIALS OR ACCESS  
11 TO MATERIALS THAT IT WOULDN'T PROVIDE TO THE DEFENSE. THAT  
12 MEANS THAT WE DON'T KNOW WHAT IS UNDERNEATH THE AGENCY'S  
13 REDACTIONS, AND WE WON'T KNOW. IT MEANS THAT WE CAN'T VIEW  
14 THEIR PRIVILEGED MATERIALS TO CONFIRM THAT A PRIVILEGE LOG IS  
15 ACCURATE OR THE CORRECT MATERIALS ARE BEING WITHHELD.

16 ALL OF THESE ISSUES JUST SERVE TO FURTHER DEMONSTRATE THAT  
17 WE DON'T HAVE ACCESS TO THESE MATERIALS.

18 SO WHILE WE'RE HAPPY TO STAY INVOLVED AS MUCH AS WE CAN  
19 AND CONTINUE TO ACT AS A MEDIATOR AND ADVISOR AND ADVOCATE IN  
20 THE WAYS THAT HAVE BEEN PRODUCTIVE SO FAR, I WOULD ASK THE  
21 COURT NOT TO ISSUE A RULE 16 ORDER DIRECTED AT THE GOVERNMENT.

22 THE COURT: OKAY. THANK YOU.

23 MR. WADE: YOUR HONOR, JUST VERY BRIEFLY. THE  
24 FIELD -- THE GOALPOSTS HAVE BEEN WHERE THEY HAVE ALWAYS BEEN.  
25 I'M NOW BEFORE THE COURT THE FOURTH TIME ASKING FOR THE SAME

11:57AM 1           THING. IT'S NOT COMPLICATED. IT'S VERY SIMPLE.

11:57AM 2                   THE COURT: WELL, I THINK WHAT MR. BOSTIC SUGGESTS  
11:57AM 3           IS THE POSTS MAY HAVE BEEN THE SAME, BUT THERE'S BEEN  
11:57AM 4           ADDITIONAL YARDAGE ENTERED INTO THE 50 YARDLINE PERHAPS AND NOW  
11:57AM 5           WE'RE LOOKING AT A DIFFERENT FIELD.

11:57AM 6                   MR. WADE: NOT AT ALL, YOUR HONOR. ALL WE'VE ASKED  
11:57AM 7           FOR IS A REPRESENTATION FROM THE AGENCIES THAT THEY HAVE  
11:57AM 8           PRODUCED ALL DOCUMENTS RESPONSIVE TO THEIR REQUESTS.

11:57AM 9                   IF THE AGENCIES COME BACK AFTER THIS MEET AND CONFER  
11:57AM 10          PROCESS -- AND BY THE WAY, THE AGENCIES, THROUGH COUNSEL, HAVE  
11:57AM 11          COME FORWARD MULTIPLE TIMES AND SAID YES, AND THEN THERE'S  
11:57AM 12          MORE; YES, AND THEN THERE'S MORE; YES, BUT THERE'S MORE.

11:57AM 13                  SO IF THESE MEET AND CONFER PROCESSES REVEAL NO ADDITIONAL  
11:57AM 14          DOCUMENTS, THEN WE'VE BEEN WASTING EVERYONE'S TIME.

11:57AM 15                  MY SPECULATION BASED UPON OUR MEET AND CONFER IS THAT  
11:57AM 16          THERE IS GOING TO BE SUBSTANTIAL ADDITIONAL DOCUMENTS.

11:58AM 17                  AND IF PREVIOUSLY STARTING IN JUNE THE SLEEVES HAVEN'T  
11:58AM 18          BEEN ROLLED UP AND THERE WAS MORE OWNERSHIP OF THIS AND A  
11:58AM 19          RECOGNITION THAT THE GOAL ISN'T TO GET AWAY WITH MINIMAL  
11:58AM 20          COMPLIANCE, THE GOAL IS TO ENSURE MAXIMUM COMPLIANCE, WE MIGHT  
11:58AM 21          HAVE GOTTEN TO THIS POINT SLIGHTLY SOONER.

11:58AM 22                  THE COURT: HOW DOES A RULE 16 ORDER FROM THIS COURT  
11:58AM 23          ASSIST IN THE PROCESS AS TO WHERE WE ARE NOW IN GOING FORWARD?

11:58AM 24                  MR. WADE: IT PUTS THE OBLIGATION ON THE LAWYERS IN  
11:58AM 25          THIS CASE TO GATHER THE MATERIALS AND PRODUCE IT AND ENSURE

11:58AM 1 THAT IT'S PRODUCED.

11:58AM 2 AND THEY ARE ACCOUNTABLE TO ANSWER TO YOUR HONOR WITH  
11:58AM 3 RESPECT TO THEIR MEETING THEIR RULE 16 OBLIGATIONS, AND WHAT  
11:58AM 4 WE -- THE RECORD IN THIS CASE MAKES CLEAR THE RESPONSIVENESS  
11:58AM 5 THAT COMES WHEN THE GOVERNMENT IS DIRECTLY INVOLVED UP UNTIL  
11:58AM 6 THE POINT WHERE WE'VE MADE REQUESTS.

11:58AM 7 YOU CAN LOOK BACK AT ALL OF THESE CORRESPONDENCE AND  
11:58AM 8 WHENEVER THE GOVERNMENT DURING THEIR PHASE OF THE CASE WHERE  
11:59AM 9 THEY WANTED THEIR MATERIALS WANTED DOCUMENTS, THEY GOT THEM  
11:59AM 10 PROMPTLY, AND THEY GOT WHAT THEY ASKED FOR, AND THEY GOT ACCESS  
11:59AM 11 TO WITNESSES, AND THEY COULD FOLLOW UP AND ASK FOR ADDITIONAL  
11:59AM 12 MATERIALS.

11:59AM 13 AND THOSE RESPONSES WERE MET COMPLETELY.

11:59AM 14 HAVING THE GOVERNMENT -- MR. BOSTIC HAS SAID HE STANDS  
11:59AM 15 PREPARED TO ROLL UP HIS SLEEVES AND DO WHATEVER HE CAN TO  
11:59AM 16 ASSIST THIS, BUT SO FAR THE MOST KNOWLEDGEABLE PERSON IN THIS  
11:59AM 17 CASE IS THE CIVIL ASSISTANT UNITED STATES ATTORNEY WHO IS  
11:59AM 18 REPRESENTING THE AGENCIES.

11:59AM 19 IN THE POSTURE OF THIS CASE WITH THE LAW IN THE NINTH  
11:59AM 20 CIRCUIT, MR. BOSTIC SHOULD BE IN THAT ROLE. HE'S MORE  
11:59AM 21 KNOWLEDGEABLE ABOUT THESE ISSUES THAN MS. DAW IS. HE'S  
11:59AM 22 ACCOUNTABLE TO THE COURT. HE'S DIRECTLY IMPACTED BY THE  
11:59AM 23 SCHEDULE.

11:59AM 24 THE COURT: WHAT IS HIS ACCESS?

11:59AM 25 MR. WADE: HIS ACCESS IS SIMILAR, BUT HIS KNOWLEDGE

11:59AM 1 IS GREATER THAN HIS COLLEAGUE WHO HAS BEEN HANDLING THIS SO  
11:59AM 2 FAR.

11:59AM 3 SO HE COULD HAVE EASILY POSED SOME OF THESE QUESTIONS IF  
12:00PM 4 HE WAS DIRECTLY INVOLVED MUCH SOONER IN THE PROCESS.

12:00PM 5 THE GOVERNMENT IN THIS CASE ISSUED A PRESERVATION ORDER  
12:00PM 6 YEARS AGO, YEARS AGO. THEY SHOULD BE AS TROUBLED AS EVERYONE  
12:00PM 7 ELSE IN THIS CASE WHEN THERE'S SOME INDICATION THAT MAY BE  
12:00PM 8 DOCUMENTS WERE NOT PRESERVED THAT ARE MATERIAL TO THE CASE.

12:00PM 9 I'M SURE THEY'RE NOT PLEASED BY THAT. NO LITIGANT IS EVER  
12:00PM 10 PLEASED BY THE DESTRUCTION OF EVIDENCE, AND I'M SURE THE  
12:00PM 11 GOVERNMENT IS NOT HERE GIVEN THAT THEY SENT CLEAR NOTICES AND  
12:00PM 12 CLEARLY ASKED THAT THE AGENCIES DO THAT.

12:00PM 13 SO THE RESPONSE SHOULD BE THAT'S TROUBLING, LET ME FOLLOW  
12:00PM 14 UP, AND LET ME GET TO THE BOTTOM OF THAT SO THAT I CAN MAKE  
12:00PM 15 REPRESENTATIONS TO THE DEFENSE AS TO WHAT HAS HAPPENED, RATHER  
12:00PM 16 THAN WAIT FOR THE LETTER TO COME FROM THE AGENCIES.

12:00PM 17 THE COURT: SO WHERE WE'VE COME NOW, AND WE ALL KNOW  
12:00PM 18 THIS, IS NOW WE HAVE THE AGENCIES ON THE LINE. THEY'RE HERE IN  
12:00PM 19 COURT PARTICIPATING IN THIS PROCESS.

12:00PM 20 WHAT IS IT THAT THIS COURT CAN DO WITH THE AGENCIES AND  
12:01PM 21 THEIR REPRESENTATIVES THAT IS NOT ENHANCED BY MR. BOSTIC NOT  
12:01PM 22 BEING IN IT?

12:01PM 23 DO YOU UNDERSTAND MY QUESTION? WHY DOES MR. BOSTIC'S  
12:01PM 24 OFFICE NEED TO HAVE RULE 16 IF I HAVE THESE LAWYERS,  
12:01PM 25 MS. TURNER, MS. NORTON, MS. MARTINEZ-RESLY, ON THE PHONE TO

12:01PM 1 ORDER DIRECTLY? THIS IS HOW WE WENT DOWN THIS PATH. WHAT DOES  
12:01PM 2 HE ADD? I HAVE THEIR ATTENTION.

12:01PM 3 MR. WADE: I WOULD ASSUME YOU DO, YOUR HONOR.  
12:01PM 4 ALTHOUGH THERE HAVE BEEN AT LEAST TWO ORDERS THAT HAVE BEEN  
12:01PM 5 IMPOSED BY THE COURT TO PRODUCE ALL OF THE DOCUMENTS, AND WE  
12:01PM 6 HAVE YET TO HAVE ALL OF THE DOCUMENTS, AND THE YEAR IS RUNNING  
12:01PM 7 OUT.

12:01PM 8 THE COURT: WHY AREN'T YOU ASKING ME TO DO SOMETHING  
12:01PM 9 TO THESE GOOD LAWYERS ON THE PHONE?

12:01PM 10 MR. WADE: WELL, THE GOOD LAWYERS ON THE PHONE ARE  
12:01PM 11 WORKING HARD. WHAT THEY NEED IS IN BETWEEN THIS HEARING AND  
12:01PM 12 WHATEVER THE NEXT DATE IS, IS SOMEONE WITH A VESTED INTEREST  
12:01PM 13 WHO WILL SUFFER CONSEQUENCES BEFORE THE COURT IF THESE  
12:01PM 14 DEADLINES ARE NOT MET TO ROLL UP AND ON A DAY-TO-DAY BASIS MAKE  
12:02PM 15 INQUIRIES AS TO WHAT WAS COLLECTED.

12:02PM 16 THE COURT: WON'T THEY SUFFER CONSEQUENCES IF THEY  
12:02PM 17 VIOLATE THE COURT ORDER? THEY WERE SUPPOSED TO HAVE BEEN IN  
12:02PM 18 COMPLIANCE OCTOBER 25.

12:02PM 19 MR. WADE: INITIALLY, YOUR HONOR, I BELIEVE THEY  
12:02PM 20 WERE SUPPOSED TO BE IN COMPLIANCE OCTOBER 2ND, AND THEY  
12:02PM 21 WEREN'T.

12:02PM 22 NOW, OCTOBER 25, AND THEY WEREN'T.

12:02PM 23 SO WE'RE GETTING CLOSE TO THE POINT WHERE EVERYTHING IS  
12:02PM 24 IMPACTED, BUT THE PARTY THAT IS BEFORE THE COURT REPRESENTING  
12:02PM 25 THE UNITED STATES SHOULD BE THE ONE THAT IS HELD ACCOUNTABLE

12:02PM 1 FOR THAT. THEY WERE ABLE TO GET THE MATERIALS WHEN THEY WANTED  
12:02PM 2 THE MATERIALS.

12:02PM 3 THE COURT: I GUESS I'M JUST CURIOUS. THIS IS  
12:02PM 4 PERSONAL INFORMATION AND NOTHING ELSE. WHAT SHOULD I DO TO  
12:02PM 5 MS. TURNER, MS. NORTON, MS. MARTINEZ-RESLY ABOUT A  
12:02PM 6 NONCOMPLIANCE ISSUE?

12:02PM 7 MR. WADE: RESPECTFULLY, YOUR HONOR, AT THIS POINT  
12:02PM 8 APART FROM ASKING THEM TO DO THE THINGS THAT WE'VE ASKED TO DO,  
12:02PM 9 NOTHING.

12:02PM 10 BUT WE ASK THAT THE GOVERNMENT LAWYERS BE HELD ACCOUNTABLE  
12:02PM 11 TO MAKE SURE THAT WE'RE NOT BACK IN THE SITUATION.

12:03PM 12 AGAIN, WE'VE SORT OF -- WE'VE HAD THIS RUNNING JOKE, YOUR  
12:03PM 13 HONOR, ABOUT, YOU KNOW, THE THIRD TIME IS A CHARM, AND THE  
12:03PM 14 FOURTH TIME IS A CHARM. I GUESS WE'RE HEADED TOWARDS THE FIFTH  
12:03PM 15 TIME.

12:03PM 16 I THINK IT'S APPROPRIATE FOR THE PARTY REPRESENTING THE  
12:03PM 17 UNITED STATES TO TAKE OWNERSHIP OF THIS.

12:03PM 18 WHEN WE HAVE THESE CONFERENCES, THEY'RE NOT A STAKEHOLDER  
12:03PM 19 IN THE CONFERENCES IN THE SAME WAY THEY WOULD BE IF THEY WERE  
12:03PM 20 GETTING THE MATERIALS FOR THEMSELVES.

12:03PM 21 THEY SHOULD BE A STAKEHOLDER.

12:03PM 22 THE COURT: WELL, I ASKED MS. TURNER, MS. NORTON,  
12:03PM 23 MS. MARTINEZ-RESLY AT THE OUTSET ABOUT THE INVOLVEMENT OF THE  
12:03PM 24 GOVERNMENT AND WHETHER OR NOT IT WAS OF ASSISTANCE TO THEM, AND  
12:03PM 25 I THINK EACH OF THEM ANSWERED AFFIRMATIVELY THAT IT WAS



12:03PM 1 HELPFUL.

12:03PM 2 MR. WADE: AND I THINK CONTINUING THEIR INVOLVEMENT  
12:03PM 3 AND ULTIMATELY IN THE POSITION WHERE THE PROSECUTION TEAM HAS  
12:03PM 4 TO COME FORWARD AND MAKE THE REPRESENTATIONS AS TO WHAT HAS  
12:03PM 5 HAPPENED HERE AND WHAT HASN'T HAPPENED HERE IS APPROPRIATE IN  
12:03PM 6 THIS CASE.

12:03PM 7 THE COURT: OKAY.

12:04PM 8 MR. WADE: I UNDERSTAND TO A DEGREE WHAT THE AGENCY  
12:04PM 9 COUNSEL -- THINGS TAKE TIME, AND THEY'RE WORKING DILIGENTLY.

12:04PM 10 THE COURT: SO 2,000 HOURS, 2,000 STAFF HOURS.

12:04PM 11 MR. WADE: I WANT TO BE RESPECTFUL OF THAT.

12:04PM 12 THE COURT: IT'S ALMOST AS MUCH AS YOU'RE BILLING.

12:04PM 13 MR. WADE: EVERYONE IS WORKING HARD IN THIS CASE,  
12:04PM 14 YOUR HONOR, GIVEN THE STAKES.

12:04PM 15 BUT I THINK THAT ON A DAY-TO-DAY BASIS GOING FORWARD  
12:04PM 16 HAVING THE PROSECUTION TEAM INVOLVED AND ASKING THESE  
12:04PM 17 QUESTIONS, I THINK THE PROSECUTION TEAM HAS A PRETTY CLEAR  
12:04PM 18 SENSE OF WHERE WE'RE GOING TO BE ON THESE ISSUES, AND THEY CAN  
12:04PM 19 ENSURE THAT WE REACH A DIFFERENT CONCLUSION BEFORE THE NEXT  
12:04PM 20 HEARING.

12:04PM 21 THE COURT: OKAY. MR. BOSTIC.

12:04PM 22 MR. BOSTIC: JUST VERY BRIEFLY, YOUR HONOR. THE  
12:04PM 23 COURT AND THE AGENCIES HAVE WHAT MR. WADE IS DESCRIBING  
12:04PM 24 ALREADY.

12:04PM 25 IF IT HAS FELT LIKE THE GOVERNMENT HAS NOT BEEN INVESTED

12:04PM 1 IN THESE PROCEEDINGS -- WELL, I'M CONFUSED TO HEAR THE DEFENSE  
12:04PM 2 SAY THAT IT FEELS LIKE THE GOVERNMENT HAS NOT BEEN INVESTED.  
12:04PM 3 WE'VE EXPENDED A TREMENDOUS AMOUNT OF EFFORT AS WELL TO TRY TO  
12:04PM 4 GET THESE EFFORTS RESOLVED.

12:04PM 5 IF IT WERE WITHIN OUR POWER TO HAND OVER ALL OF THE  
12:05PM 6 DOCUMENTS THAT THE DEFENSE IS REQUESTING, OF COURSE WE WOULD  
12:05PM 7 HAVE DONE THAT ALREADY.

12:05PM 8 LIKE THE COURT, WE WANT TO MOVE PAST THIS ISSUE. THERE  
12:05PM 9 ARE MORE IMPORTANT THINGS TO DISCUSS IN THIS CASE. WE WOULD  
12:05PM 10 LIKE TO GET TO THE BUSINESS OF ACTUALLY PROSECUTING THE CASE.

12:05PM 11 SO IF IT WERE WITHIN OUR POWER TO RESOLVE THESE ISSUES  
12:05PM 12 INSTANTLY OVER THE COURSE OF THE NEXT WEEK, WE WOULD HAVE DONE  
12:05PM 13 THAT ALREADY. WE HAVE DONE EVERYTHING WE CAN. WE'LL CONTINUE  
12:05PM 14 TO DO THAT.

12:05PM 15 BUT IF THE CONVERSATION IS ABOUT MAKING THE GOVERNMENT,  
12:05PM 16 MAKING THE PROSECUTION ACCOUNTABLE, AS THE DEFENSE IS  
12:05PM 17 ADVOCATING FOR, I JUST DON'T THINK THAT THAT'S WHAT RULE 16 IS  
12:05PM 18 ABOUT BECAUSE THE GOVERNMENT DOESN'T HAVE THE POWER TO RESOLVE  
12:05PM 19 THESE ISSUES.

12:05PM 20 IF WE DID, I -- I FEEL LIKE I'M SAYING THE SAME THING OVER  
12:05PM 21 AND OVER AGAIN.

12:05PM 22 THE COURT: NO. NO.

12:05PM 23 MR. BOSTIC: SO I THINK, AS THE COURT SAID, IT HAS  
12:05PM 24 THE AGENCY'S ATTENTION. IT HAS HAD THE AGENCY'S ATTENTION FOR  
12:05PM 25 SOME TIME. THE ISSUE IS NOT COMPLACENCY ON THE PART OF THE

12:05PM 1 AGENCIES, AT LEAST FROM MY PERSPECTIVE.

12:05PM 2 THE ISSUE IS SIMPLY THAT WE'RE TALKING ABOUT A VERY BROAD  
12:05PM 3 SCOPE OF DOCUMENT COLLECTION AND PRODUCTION. THEY'VE PUT IN A  
12:06PM 4 LOT OF HOURS TO MEET THEIR OBLIGATIONS, AND THEY'RE CONTINUING  
12:06PM 5 TO DO SO.

12:06PM 6 EVERY TIME WE COME BACK TO THE COURT, THE DEFENSE DOES  
12:06PM 7 HAVE A NEW ROUND OF COMPLAINTS THAT EXPAND, AT LEAST IN THE  
12:06PM 8 AGENCY'S MIND, THE JOB THAT THEY'RE TASKED WITH PERFORMING.

12:06PM 9 SO THAT'S THE SITUATION THAT THEY'RE IN.

12:06PM 10 THE GOVERNMENT BELIEVES THAT THE REMAINING COMPLAINTS BY  
12:06PM 11 THE DEFENSE CAN BE RESOLVED. WE WOULD LIKE THE OPPORTUNITY TO  
12:06PM 12 DO THAT IN THE SAME WAY THAT WE HAVE BEEN DOING.

12:06PM 13 THE COURT: OKAY. THANK YOU VERY MUCH.

12:06PM 14 MR. COPPERSMITH, YOU'RE PULLING THE MIKE TO YOURSELF.

12:06PM 15 MR. COOPERSMITH: YES, YOUR HONOR. THANK YOU.

12:06PM 16 WE ALL KNOW THE DEPARTMENT OF JUSTICE WORKS WITH AGENCIES  
12:06PM 17 ALL OF THE TIME. THEIR CIVIL COUNTERPART IS WORKING WITH THE  
12:06PM 18 AGENCIES. THIS IS NO EARTHSHAKING SURPRISE THAT THE DEPARTMENT  
12:06PM 19 OF JUSTICE COULD WORK WITH AGENCIES TO OVERSEE A PROCESS UNDER  
12:06PM 20 RULE 16. THAT'S NOTHING REALLY THAT UNUSUAL.

12:06PM 21 I THINK GIVEN WHAT HAS OCCURRED, YOU KNOW, I DISAGREE WITH  
12:06PM 22 MR. BOSTIC THAT THIS HAS BEEN SOME KIND OF MOVING OF THE  
12:07PM 23 GOALPOSTS OR EXPANDING. I THINK IF THE DOJ WAS INVOLVED ALL  
12:07PM 24 ALONG, AND WITH THEIR INVOLVEMENT GOING FORWARD, I THINK WE'LL  
12:07PM 25 HAVE LESS, FEWER PROBLEMS, NOT MORE.

12:07PM 1 IT'S ONLY THE DEPARTMENT OF JUSTICE THAT HAS THE INCENTIVE  
12:07PM 2 AND THE KNOWLEDGE OF THIS CASE TO MAKE SURE THAT THE COURT  
12:07PM 3 ORDER IS COMPLETELY COMPLIED WITH, THAT THE DEFENSE GETS ALL OF  
12:07PM 4 THE MATERIAL THAT THEY'RE SUPPOSED TO GET.

12:07PM 5 YOU KNOW, WE'VE SEEN BRADY EVIDENCE IN THESE PRODUCTIONS,  
12:07PM 6 YOUR HONOR. WE'VE INFORMED THE GOVERNMENT OF THE BRADY  
12:07PM 7 EVIDENCE THAT WE HAVE FOUND. AND THIS IS CRUCIAL. THIS IS THE  
12:07PM 8 WAY THAT OUR CLIENTS GET A FAIR TRIAL.

12:07PM 9 THE ONLY APPROPRIATE AGENCY TO OVERSEE THAT IS THE  
12:07PM 10 DEPARTMENT OF JUSTICE.

12:07PM 11 THE COURT: ALL RIGHT. THANK YOU.

12:07PM 12 MR. LEACH, ANYTHING YOU WANT TO ADD TO THE CONVERSATION,  
12:07PM 13 SIR?

12:07PM 14 MR. LEACH: NO. THANK YOU.

12:07PM 15 THE COURT: ALL RIGHT. THANK YOU.

12:07PM 16 ALL RIGHT. WELL, LET ME INDICATE THAT I'VE -- YOU KNOW,  
12:07PM 17 I'VE ENJOYED THE CONVERSATION THIS MORNING AS I DO EVERY TIME  
12:07PM 18 WE ALL GET TOGETHER. YOU'VE BEEN VERY HELPFUL IN INFORMING THE  
12:07PM 19 COURT OF YOUR POSITIONS.

12:07PM 20 AGAIN, I THINK I'M ACCURATE IN THE OBSERVATION THAT WE'RE  
12:07PM 21 ALL OF COMMON PURPOSE TO GET THE CASE TO TRIAL BY THE DATE THAT  
12:08PM 22 I HAVE SET. IT'S A HARD DATE.

12:08PM 23 IT IS IMPORTANT, AND I RECOGNIZE THE DEFENSE'S COMMENTS,  
12:08PM 24 IT'S IMPORTANT THAT THESE DEFENDANT'S RIGHTS ARE PROTECTED.  
12:08PM 25 THEY HAVE CONSTITUTIONAL RIGHTS. THIS IS WHAT I WAS MENTIONING

12:08PM 1 EARLIER WHEN I SPOKE WITH MS. TURNER, MS. NORTON,  
12:08PM 2 MS. MARTINEZ-RESLY ABOUT THE SOMETIMES TENSION THAT COMES UP  
12:08PM 3 VIS-A-VIS CRIMINAL CASES AND CIVIL OBLIGATIONS AND CRIMINAL  
12:08PM 4 OBLIGATIONS FOR DISCOVERY.

12:08PM 5 BUT THE PARTIES WILL GET A FAIR TRIAL. THEY WILL GET A  
12:08PM 6 FAIR TRIAL. THEY'LL GET THEIR DAY IN COURT. THEY WILL HAVE  
12:08PM 7 THEIR DAY IN COURT.

12:08PM 8 OUR EFFORTS THROUGHOUT THE TIMES THAT WE HAVE MET HERE  
12:08PM 9 PRELIMINARILY ARE TO ENSURE THAT THIS INFORMATION THAT THEY  
12:08PM 10 SHOULD RECEIVE THEY DO GET IN A TIMELY MANNER SUCH THAT THEY  
12:08PM 11 CAN USE IT AS THEY FEEL APPROPRIATE. THAT'S GOING TO HAPPEN,  
12:08PM 12 AND THAT'S WHAT WE HAVE PROCESSED HERE NOTWITHSTANDING MY  
12:09PM 13 COMMENTS THROUGHOUT OUR CONVERSATION SOMETIMES A BIT FLIPPANT  
12:09PM 14 ABOUT SPORTS METAPHORS, ANALOGIES, ET CETERA.

12:09PM 15 I DON'T MEAN TO MAKE LIGHT OF ANY OF THE SERIOUSNESS OF  
12:09PM 16 THE CIRCUMSTANCES HERE. IT'S VERY IMPORTANT. IT'S VERY  
12:09PM 17 IMPORTANT. IT'S IMPORTANT FOR THE GOVERNMENT. IT'S IMPORTANT  
12:09PM 18 FOR THE DEFENDANTS.

12:09PM 19 I INTEND, AND I'M GOING TO CONTINUE TO DO MY BEST TO  
12:09PM 20 MARSHAL FORWARD AND MAKE SURE AND ENSURE THAT EVERYONE'S RIGHTS  
12:09PM 21 ARE PROTECTED AND THAT PRIVILEGES THAT EXIST ARE PROTECTED,  
12:09PM 22 THAT THE RULES OF DISCOVERY ARE PROTECTED FROM ALL PARTIES,  
12:09PM 23 INCLUDING THE AGENCIES, AND AS WELL AS OBLIGATIONS TO DISCLOSE.  
12:09PM 24 THOSE ARE PARAMOUNT AND IMPORTANT HERE.

12:09PM 25 LET ME TALK ABOUT DOCUMENT 170-6, WHICH IS YOUR PROPOSED

12:09PM 1 SCHEDULE. I'VE RECEIVED THAT.

12:09PM 2 IS THIS A SCHEDULE THAT YOU'D LIKE THE COURT TO ADOPT  
12:09PM 3 THEN?

12:09PM 4 IS THE GOVERNMENT ASKING, MR. SCHENK, THAT THE COURT ADOPT  
12:10PM 5 THIS SCHEDULE?

12:10PM 6 MR. SCHENK: YES, YOUR HONOR. THANK YOU.

12:10PM 7 MR. WADE: YOUR HONOR, THE DIRECT ANSWER TO YOUR  
12:10PM 8 QUESTION, IN LIGHT OF THE COURT'S COMMENTS AT THE PRIOR HEARING  
12:10PM 9 WITH RESPECT TO THE TRIAL DATE, IS YES. WE'VE MET AND  
12:10PM 10 CONFERRED IN AN EFFORT TO SHOEHORN EVERYTHING WITHIN THAT.

12:10PM 11 AS WE ACTUALLY SAID WHEN SCHEDULING FIRST CAME UP IN JUNE,  
12:10PM 12 TIME IS OF THE ESSENCE, AND THE DELAYS HAVE BEEN SIGNIFICANT.  
12:10PM 13 AND SO WE'RE NOT SEEKING ANYTHING FROM THE COURT AT THIS TIME,  
12:10PM 14 BUT SOME OF THE ITEMS IN THIS CASE THAT WERE CONTEMPLATED WHEN  
12:10PM 15 WE MET AND CONFERRED ON THE SCHEDULE AS A WHOLE IN RESERVING  
12:10PM 16 THE TRIAL DATES HAVE TAKEN MUCH MORE TIME THAN WE EXPECTED.

12:10PM 17 THAT HAS THE PROSPECT OF AFFECTING POTENTIAL MOTIONS,  
12:10PM 18 AFFECTING POTENTIAL EXPERTS, ET CETERA.

12:10PM 19 SO WE'RE CONTINUING TO WORK. WE HAVE THE TIME BLOCKED.  
12:10PM 20 WE WANT TO DO EVERYTHING WE CAN TO GET THAT TRIAL ON SCHEDULE,  
12:11PM 21 BUT I WANT TO BE CANDID WITH THE COURT ABOUT OUR CONCERN THAT  
12:11PM 22 WE ARE RUNNING OUT OF TIME ON DELAYS WITH RESPECT TO SOME OF  
12:11PM 23 THESE ISSUES.

12:11PM 24 THE COURT: ALL RIGHT. WELL, THANK YOU FOR THAT  
12:11PM 25 OBSERVATION. I THINK YOU HAVE SOME TIME.

1 WE'RE SCHEDULED FOR JURY SELECTION ON JULY 28TH, THE END  
2 OF JULY NEXT YEAR, AND THEN EVIDENCE WILL START AUGUST 4TH.  
3 THAT'S OUR CURRENT SCHEDULE.

4 I'D LIKE, AS I SAID, I WOULD LIKE TO KEEP IT ON SCHEDULE  
5 SUCH THAT YOU CAN NOTIFY YOUR WITNESSES THAT THEY HAVE DATES  
6 CERTAIN, YOU CAN MAKE YOUR PLANS, YOUR PERSONAL PLANS  
7 ACCORDINGLY AS WELL.

8 I NOTE THAT YOU SUGGEST HEARING ON 12(B) (3) MOTIONS ON  
9 MONDAY, FEBRUARY 10TH. WE'RE GOING TO LOOK AT OUR SCHEDULE. I  
10 THINK THAT'S AVAILABLE. WE MAY START THOSE IN THE MORNING.  
11 I'M GOING TO ASK OUR COURTROOM DEPUTY TO SET OUR CRIMINAL  
12 CALENDAR LIGHT THAT DAY, IF AT ALL. SO WE MIGHT DEVOTE THAT  
13 ENTIRE DAY TO THIS CASE.

14 SO WE'LL DO WHAT WE CAN, AND I HOPE THIS IMPRESSES ON YOU,  
15 I'M GOING TO DO WHAT I CAN WITH OUR CALENDAR MANAGEMENT TO  
16 ALLOW THE CASE TO PROCEED ACCORDING TO THE SCHEDULE.

17 OUR PRETRIAL CONFERENCE, I THINK YOU HAVE SUGGESTED THAT  
18 ON JULY 9TH, WHICH IS A THURSDAY. I'M HAPPY TO ACCOMMODATE  
19 THAT DAY. THAT'S A CIVIL CALENDAR DAY AS YOU KNOW FOR US.

20 BUT AS YOU KNOW, I CAN ALSO BLOCK OFF THAT DATE, WHICH I  
21 PROBABLY WILL DO. WE PROBABLY WILL NOT HAVE ANYTHING ON  
22 JULY 9TH BY WAY OF CIVIL MATTERS, AND WE'LL JUST GIVE YOUR CASE  
23 THAT ENTIRE DAY TO ACCOMPLISH THE PRETRIAL CONFERENCE.

24 SO I TELL YOU THAT JUST TO INFORM YOU THAT, AGAIN, THAT'S  
25 A HARD SET DATE, AND I WILL TELL OUR CIVIL LITIGANTS, AND AS

12:12PM 1 YOU KNOW THERE ARE MANY OF THEM IN THIS COURTHOUSE, THAT THEY  
12:13PM 2 WILL NOT BE ABLE TO COME TO COURT JULY 9TH TO HEAR CIVIL  
12:13PM 3 MOTIONS, AND I'LL RESERVE THAT FOR YOUR CASE, THIS CASE.

12:13PM 4 THE OTHER DEADLINES THAT YOU HAVE HERE SEEM APPROPRIATE  
12:13PM 5 THAT YOU HAVE SUGGESTED. THANK YOU FOR MEETING AND CONFERRING  
12:13PM 6 AND LOOKING AT YOUR SCHEDULES TO REACH AGREEMENT ON A SCHEDULE  
12:13PM 7 THAT IS APPROPRIATE FOR ALL OF YOU.

12:13PM 8 SO I'LL ADOPT EXHIBIT F.

12:13PM 9 AS TO THE COURT'S RULING ON RULE 16, YOU HEARD ME GIVE MY  
12:13PM 10 PRELIMINARY THOUGHTS AND IDEAS ABOUT GOING FORWARD WITH THE  
12:13PM 11 DISCOVERY ORDER. I'M GOING TO ISSUE A WRITTEN ORDER AND  
12:13PM 12 HOPEFULLY GET THAT OUT SHORTLY. I APPRECIATE THE COMMENTS OF  
12:13PM 13 THE GOVERNMENT AS TO WHY SHOULD WE CHANGE THINGS NOW, IT SEEMS  
12:13PM 14 TO BE WORKING THE WAY IT'S GOING FORWARD.

12:13PM 15 I THINK THERE'S SOME CURRENCY TO THAT. THINGS HAVE BEEN  
12:13PM 16 PROCEEDING, AND I'M GLAD WE HAVE COUNSEL ON THE LINE.

12:13PM 17 ALTHOUGH I TOLD MR. WADE, I THINK IN OCTOBER, THAT, WELL,  
12:13PM 18 MAYBE I'LL HAVE COUNSEL HEAR STANDING AT THE LECTERN WHERE  
12:14PM 19 YOU'RE STANDING, MR. WADE. I SUPPOSE WE'RE MOVING IN THAT  
12:14PM 20 DIRECTION. COUNSEL APPEARED TELEPHONICALLY NOW, AND IT MAY BE  
12:14PM 21 THAT THEY'LL -- I'LL ASK THEM TO COME AND JOIN US IN SAN JOSE  
12:14PM 22 AT SOME TIME IN THE FUTURE IF NEED BE.

12:14PM 23 LET ME ASK YOU, NOTWITHSTANDING THE SCHEDULE HERE, IS  
12:14PM 24 THERE A NEED TO REQUEST -- A DESIRE FOR US TO MEET AGAIN AT  
12:14PM 25 SOME TIME?



12:14PM 1 ANYONE HAVE THOUGHTS ABOUT THAT?

12:14PM 2 MR. WADE: YOUR HONOR, MAYBE JUST A CONTROL DATE ON  
12:14PM 3 THIS ISSUE. I KNOW WE'VE TALKED BEFORE ABOUT WANTING TO AVOID  
12:14PM 4 THAT FIFTH HEARING, AND MY HOPE AND EXPECTATION IS THAT WE  
12:14PM 5 WILL, BUT IT WOULD SEEM LIKE THINGS SEEM TO HAPPEN WHEN PEOPLE  
12:15PM 6 ARE GOING TO APPEAR IN FRONT OF THE COURT AND HAVING A CONTROL  
12:15PM 7 DATE FOR WHATEVER ACTIONS THE COURT ORDERS I THINK MIGHT BE  
12:15PM 8 APPROPRIATE.

12:15PM 9 THE COURT: SURE. WELL, YOUR SCHEDULE SUGGESTS I  
12:15PM 10 THINK IT'S FEBRUARY 10TH FOR HEARING ON THE 12(B) MOTIONS.

12:15PM 11 SO WOULD YOU WANT SOMETHING IN JANUARY THEN? LET ME GIVE  
12:15PM 12 YOU A MOMENT TO MEET AND CONFER ON THAT.

12:15PM 13 MR. BOSTIC: THANK YOU, YOUR HONOR.

12:15PM 14 (DISCUSSION OFF THE RECORD.)

12:15PM 15 MR. WADE: ASSUMING, BASED ON THE DIRECTION FROM THE  
12:15PM 16 COURT AS TO WHERE THE ORDER WILL COME OUT BEING BY THE END OF  
12:15PM 17 THE YEAR AND MAYBE A DATE JANUARY 13TH, A COUPLE WEEKS AFTER  
12:15PM 18 THAT SO WE'RE ABLE TO ASSESS WHERE THE AGENCIES ARE.

12:15PM 19 OF COURSE, IF THERE IS FULL COMPLIANCE WITH THE ORDER WE  
12:16PM 20 CAN ADVISE THE COURT AND TAKE THAT DATE -- I'M SURE THE COURT  
12:16PM 21 WOULD NOT OBJECT TO US NOT APPEARING IF WE DON'T HAVE ANYTHING  
12:16PM 22 TO DISAGREE ABOUT.

12:16PM 23 THE COURT: HOW DOES THAT LOOK, MS. KRATZMANN?

12:16PM 24 THE CLERK: IN THE MORNING, YOUR HONOR, YOU'RE  
12:16PM 25 AVAILABLE.

12:16PM 1 THE COURT: IS THE MORNING GOOD?

12:16PM 2 MR. BOSTIC: YES, YOUR HONOR.

12:16PM 3 MR. WADE: THAT WORKS.

12:16PM 4 THE COURT: MORNING?

12:16PM 5 MR. COOPERSMITH: YES, YOUR HONOR.

12:16PM 6 THE COURT: SHOULD THAT BE 10:00 A.M.,

12:16PM 7 MS. KRATZMANN?

12:16PM 8 THE CLERK: YES, YOUR HONOR.

12:16PM 9 THE COURT: ALL RIGHT. LET'S SET THAT THEN.

12:16PM 10 JANUARY 13TH, JANUARY 13TH AT 10:00 A.M. FOR FURTHER

12:16PM 11 STATUS. AGAIN, THAT'S A RESERVE, A PLACEHOLDER DATE, SHOULD IT

12:16PM 12 BE REQUIRED. WE'LL SEE YOU BACK THEN.

12:16PM 13 OF COURSE, IF YOU NEED TO EVER HAVE ACCESS TO THE COURT,

12:16PM 14 YOU JUST NEED TO CALL MS. KRATZMANN FOR ANY INTERIM DATE AND

12:16PM 15 SHE CAN SET THAT, AND I'LL BE HAPPY TO ACCOMMODATE AS BEST WE

12:16PM 16 CAN.

12:16PM 17 AGAIN, I'M MOVING WITH YOU COLLABORATIVELY TO MOVE THE

12:17PM 18 CASE FORWARD AS BEST AS POSSIBLE. THAT'S MY GOAL HERE.

12:17PM 19 MR. WADE: WE APPRECIATE THE ACCOMMODATION.

12:17PM 20 THE COURT: ALL RIGHT. ANYTHING FURTHER?

12:17PM 21 MR. BOSTIC: AT THE LAST APPEARANCE IN THIS MATTER

12:17PM 22 THE GOVERNMENT REQUESTED THAT THE COURT ORDER THE PARTIES TO

12:17PM 23 MEET AND CONFER. I THOUGHT IT WAS IMPORTANT THAT THERE WAS A

12:17PM 24 COURT ORDER TO REQUIRE THAT TO HAPPEN.

12:17PM 25 I WON'T MAKE THAT REQUEST AGAIN. I THINK THAT THAT

12:17PM 1 CONVERSATION WILL CONTINUE IN GOOD FAITH, BUT IF THE COURT IS  
12:17PM 2 INCLINED TO ORDER IT, OF COURSE THE PARTIES ARE HAPPY TO COMPLY  
12:17PM 3 WITH THAT.

12:17PM 4 THE COURT: WELL, MR. WADE'S OBSERVATION SEEMED TO  
12:17PM 5 BE THAT PEOPLE, FOR WHATEVER REASON, SEEM TO FOLLOW COURT  
12:17PM 6 ORDERS, OR NOT WAS HIS OBSERVATION AS WELL.

12:17PM 7 SO I'LL PROBABLY INCORPORATE SOMETHING LIKE THAT IN THE  
12:17PM 8 ORDER.

12:17PM 9 MS. TURNER, MS. NORTON, MS. MARTINEZ-RESLY, ANYTHING ELSE  
12:17PM 10 YOU WOULD LIKE TO ADD BEFORE WE DISENGAGE THE LINE?

12:17PM 11 MS. MARTINEZ-RESLY: YOUR HONOR, THIS IS  
12:17PM 12 JACKLYN MARTINEZ-RESLY.

12:17PM 13 I JUST WANTED TO CORRECT THE RECORD ON ONE POINT. I THINK  
12:17PM 14 I HEARD MR. BOSTIC AT SOME POINT SAY THAT THE FDA HAS ADDRESSED  
12:17PM 15 ALL OF THE EXAMPLES THAT THE DEFENDANT HAD BROUGHT TO ITS  
12:18PM 16 ATTENTION, TO FDA'S ATTENTION WITH RESPECT TO THE SCOPE OF THE  
12:18PM 17 REDACTIONS, AND I JUST WANTED TO STATE THAT THE FDA HAS NOT  
12:18PM 18 GOTTEN BACK WITH RESPECT TO THE, WITH RESPECT TO THE EXAMPLES  
12:18PM 19 ATTACHED TO DOCUMENT 170 BUT WILL DO SO SHORTLY.

12:18PM 20 THE COURT: OKAY.

12:18PM 21 MS. MARTINEZ-RESLY: AND THAT'S IT.

12:18PM 22 THE COURT: THANK YOU VERY MUCH.

12:18PM 23 MS. TURNER? MS. NORTON?

12:18PM 24 MS. TURNER: YOUR HONOR, THIS IS MS. TURNER.

12:18PM 25 THERE IS NOTHING FURTHER.

12:18PM 1 THE COURT: GREAT.

12:18PM 2 MS. NORTON: AND NOTHING FURTHER FROM ME, YOUR

12:18PM 3 HONOR. MS. NORTON.

12:18PM 4 THE COURT: THANK YOU VERY MUCH.

12:18PM 5 THANK YOU, MS. KRATZMANN.

12:18PM 6 MS. MARTINEZ-RESLY, MS. NORTON, MS. TURNER, THE JANUARY

12:18PM 7 STATUS CONFERENCE, I'M INVITING YOU TO JOIN US AGAIN AT THIS

12:18PM 8 POINT TELEPHONICALLY, AND IF THAT CHANGES, WHICH IS TO SAY IF I

12:19PM 9 REQUEST YOUR PRESENCE HERE IN SAN JOSE, WE'LL LET YOU KNOW IN A

12:19PM 10 TIMELY MANNER AS WELL.

12:19PM 11 MS. MARTINEZ-RESLY: THANK YOU, YOUR HONOR.

12:19PM 12 THE COURT: ALL RIGHT. THANK YOU. MS. DAW,

12:19PM 13 ANYTHING FURTHER?

12:19PM 14 MS. DAW: NO, YOUR HONOR. THANK YOU.

12:19PM 15 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. GOOD

12:19PM 16 SEEING YOU ALL.

12:19PM 17 THE TIME EXCLUSION REMAINS IN PLACE TO THE TRIAL DATE AS

12:19PM 18 PREVIOUSLY INDICATED.

12:19PM 19 MR. DOWNEY: THANK YOU, YOUR HONOR.

12:19PM 20 THE CLERK: COURT IS CONCLUDED.

12:19PM 21 (COURT CONCLUDED AT 12:19 P.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

DATED: NOVEMBER 7, 2019